SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE & LOAN CORPORATION, APPELLANT,

vs.

WACHOVIA BANK AND TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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[fol. 1]

IN SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1935

RICHMOND MORTGAGE & LOAN CORPORATION

v.

WACHOVIA BANK & TRUST COMPANY and ALEXANDRA GARRETT JOHNSTON, Executors of the Estate of Robert P. Johnston, Deceased

Before Oglesby, J., August Term, 1935, Buncombe Superior Court—Plaintiff Appealed

Summons Dated June 18, 1934, Out of the General County Court, Showing Service June 18, 1934

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

COMPLAINT

The plaintiff, for its cause of action against the defendants, alleges and avers:

1. That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal place of business at Richmond, Va.

2. That the defendant, Wachovia Bank and Trust Company, is a banking corporation organized and existing under and by virtue of the laws of the State of North Carolina, with an office at Asheville, North Carolina, and the defendant, Alexandra Garrett Johnston, is a citizen and resident of the State of North Carolina, and that the said defendants jointly are executors of the estate of Robert P. Johnston, deceased, and have at all the times hereinafter set forth been qualified as such executors and have been carrying on and attending to the duties as executors of said estate.

[fol. 2] 3. That on or about the 15th day of August, 1928, the said defendants, as executors of the estate of Robert P. Johnston, deceased, borrowed from the State-Planters Bank & Trust Company, of Richmond, Virginia, the sum of

$8,000.00 and as evidence of said indebtedness executed their promissory negotiable notes in the aggregate amount of $8,000.00, said notes being payable over a period of years with the last and final payment of $6,400.00 becoming due on August 15, 1933, said notes so executed by the defendants bearing interest at the rate of six per cent per annum, payable semi-annually, and being evidenced by interest notes.

4. That at the same time that the said defendants executed and delivered the above referred to promissory notes they also executed and delivered a deed of trust to David B. Harris and Tristram T. Hyde, Jr., Trustees, which said deed of trust was dated the 15th day of August, 1928, and by the terms of said deed of trust the said defendants pledged as security for said indebtedness of $8,000.00 a certain tract or parcel of land, together with the improvements located thereon, situate in the City of Asheville, County of Buncombe and State of North Carolina, and being more particularly described as located on the Eastern margin of Grove Street and being a part of the property conveyed to R. P. Johnston, et al., by deed dated December 14, 1905, and recorded in the office of the Register of Deeds for Buncombe County, North Carolina, in deed book 141, at page 434; said deed of trust being of record in the Office of the Register of Deeds for Buncombe County, North Carolina, in deed of trust book 300, at page 87, and to which reference is made for further particulars as to the express terms thereof.

5. That the said defendants, as executors of the estate of Robert P. Johnston, deceased, paid or caused to be paid on said principal indebtedness the sum of $1,200.00, but defaulted in the payment of the principal indebtedness due on August 15, 1932, and also defaulted in the payment of [fol. 3] the interest which became due on August 15, 1932, and because of the continued defaults of the said defendants in the payment of said indebtedness the said holder and owner of said notes called on the acting Trustee, David B. Harris, in said deed of trust to foreclose the said property in accordance with the power of sale contained in said deed of trust, and thereupon declared the whole of said indebtedness due and payable as the said holder of said notes had the right to do in accordance with the express terms and conditions of said notes and deed of trust.

6. That thereafter the said David B. Harris, acting Trustee, did advertise said property in accordance with the terms of said deed of trust and in accordance with the statutory law of the State of North Carolina, and exposed the same to public sale on the 19th day of June, 1933, where and when the Madison Investment Company, Incorporated, a corporation, became the last and highest bidder for the same at the price of $3,000.00, and ten days thereafter elapsing and no raised bid having been filed with the Clerk of the Superior Court of Buncombe County, as provided by the statutory law of the State of North Carolina the said sale was confirmed and deed to the property was made to said Madison Investment Company, Incorporated.

7. That out of the proceeds of said sale the said Trustee paid, or caused to be paid, advertising costs in the sum of $6.64, Court costs in the sum of $2.25, and Trustee's fee in the sum of $150.00, and making an aggregate amount of $158.89, and after deducting said sum so expended by the Trustee from the $3,000.00, the price bid for said property, there remained to be credited on said notes and paid to said noteholders the sum of $2,841.11.

8. That at the time of said foreclosure sale there was due on said indebtedness the principal sum of $6,800.00, together with the sum of $204.00 interest that matured on August 15, 1932, and also the sum of $192.00 of interest that matured on February 15, 1933, and making a total indebtedness due of $7,196.00 with interest thereon from [fol. 4] February 15, 1933, to the date of sale, to-wit: June 19, 1933, which said interest amounted to $179.90, and making a total of principal and interest due on the date of said sale of $7,375.90; that after crediting on said amount due the sum of $2,841.11 realized from the sale of said property on June 19th, 1933, there remained due and payable as of said date the sum of $4,534.79, together with interest thereon from June 19, 1933, until paid, and although demand has been made upon the defendants for the payment of the same they have refused and neglected to pay the same.

9. That the plaintiff in this action is now the owner and holder of said promissory notes as executed by the said defendants, having purchased the same for a valuable consideration.

Wherefore, plaintiff prays the Court:

1. That it have and recover of the said Wachovia Bank & Trust Company and Alexandra Garrett Johnston, joint executors of the estate of Robert P. Johnston, deceased, the sum of $4,534.79, together with interest thereon from the 19th day of June, 1933, until paid.

2. For the costs of this action to be taxed by the Clerk.

3. And for such other and further relief as to the Court may seem just and proper.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff.

(Verified.)

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

ANSWER

The defendants, answering the complaint filed in the above entitled action, say:

1. That they are informed and believe that the allegations of paragraph 1 of said complaint are true.

2. That the allegations of paragraph 2 of said complaint are admitted.

3. That the allegations of paragraph 3 of said complaint are admitted.

4. That the allegations of paragraph 4 of said complaint are admitted.

5. That the allegations of paragraph 5 of said complaint are admitted.

[fol. 5] 6. That the allegations of paragraph 6 of said complaint are admitted.

7. That the allegations of paragraph 7 of said complaint are admitted.

8. That the allegations of paragraph 8 of said complaint are admitted.

9. That the defendants have no knowledge or sufficient information upon which to form a belief as to the truth

of the allegations contained in paragraph 9 of said complaint, and therefore, deny the same.

Further Answer and Defense

Further answering said complaint, and by way of defense to the cause of action therein set forth, the defendants allege:

1. That the defendants are informed and believe, and so allege, that at the time of the foreclosure of the deed of trust mentioned in the complaint, to-wit: June 19, 1933, the State-Planters Bank & Trust Company was the owner and holder of the indebtedness secured by said deed of trust.

2. That the defendants are informed and believe, and so allege, that on June 19, 1933, the Madison Investment Company, the purchaser at said foreclosure sale, was a subsidiary of said State-Planters Bank & Trust Company, the owner and holder of said indebtedness, the said State-Planters Bank & Trust Company, being, at the time, the owner and holder of the capital stock of said Madison Investment Company, except qualifying shares held by Directors.

3. That, therefore, the holder of the obligation secured by said deed of trust became the purchaser of the property described therein, and directly or indirectly took title to the same.

4. That at the time of the sale under foreclosure the property described in said deed of trust and sold was fairly worth the amount of the debt secured by said deed of trust and the amount bid at said sale was substantially less than the true value of said property.

5. That the defendants are informed and believe, and so allege, that the plaintiff is a subsidiary of State-Planters [fol. 6] Bank & Trust Company, said State-Planters Bank & Trust Company being the owner of the capital stock of the plaintiff, except qualifying shares held by directors.

6. That the defendants are informed and believe, and so allege, that the State-Planters Bank & Trust Company is the owner, directly or indirectly, of indebtedness mentioned in the complaint and is, therefore, the real party in interest in this action, and the plaintiff is not entitled to maintain or to prosecute the same.

Wherefore, having fully answered, the defendants pray:

1. That the plaintiff take nothing by its action.

2. That the defendants recover of the plaintiff their costs incurred herein.

3. That the defendants have such other and further relief as to the Court may seem just and proper.

Bourne, Parker, Bernard & DuBose, Attorneys for Defendants.

(Verified.)

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

AMENDED ANSWER

The defendants, by leave of Court, answering the complaint heretofore filed herein and the reply of the plaintiff, allege:

1. That the defendants are informed and believe and so allege, that at the time of the foreclosure of the deed of trust mentioned in the complaint, to-wit: June 19, 1933, and prior to and since said date, the Richmond Mortgage & Loan Corporation was the owner and holder of the indebtedness secured by said deed of trust, and which is the subject of this suit.

2. That the defendants are informed and believe, and so allege, that on June 19, 1933, and prior to and since said date, the Richmond Mortgage & Loan Corporation owned all the capital stock of the Madison Investment Company, the purchaser at said foreclosure sale, and that said Madison Investment Company was, and is, a subsidiary of said Richmond Mortgage and Loan Corporation, the owner and [fol. 7] holder of said indebtedness, and upon the foreclosure aforesaid, the said Richmond Mortgage & Loan Corporation became indirectly the purchaser at said sale and the owner of the property described in said deed of trust.

3. That therefore the holder of the obligation secured by said deed of trust became the purchaser of the property described therein, and directly or indirectly took title to the same.

4. That at the time of the sale under foreclosure above mentioned, the property described in said deed of trust and sold had a fair market value equal to the amount of the debt secured by said deed of trust and was fairly worth the amount of the debt.

5. That the amount bid at said foreclosure sale was substantially less than the true value of the property described in said deed of trust.

6. That the value of the outstanding capital stock of the Madison Investment Company is only $30.00, and said Company is indebted to the plaintiff in approximately $120,000.00, and its indebtedness to all other persons is approximately $3,000.00.

Wherefore, having fully answered, the defendants pray:

1. That the plaintiff take nothing by its action.

2. That the defendants recover of the plaintiff their costs incurred herein.

3. That the defendants have such other and further relief as to the Court may seem just and proper.

Bourne, Parker, Bernard & DuBose, Attorneys for Defendants.

(Verified.)

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

REPLY

The plaintiff replying to the further answer and defense of the defendant alleges and avers:

1. That the allegations contained in paragraph 1 of said further answer and defense are untrue and are, therefore, denied.

2. That the allegations contained in paragraph 2 of said further answer and defense are untrue and denied; the [fol. 8] truth of the matter being that the Madison Investment Company and the State-Planters Bank & Trust Company are two separate and distinct corporate entities.

3. Answering paragraph 3 of said further answer and defense, this plaintiff says that the conclusions of law and facts as set forth therein are untrue and are, therefore, denied.

4. That the allegations contained in paragraph 4 of the said further answer and defense are untrue and, therefore, denied.

5. That the allegations contained in paragraph 5 of said further answer and defense are untrue and are, therefore, denied, the truth of the matter being that State-Planters Bank & Trust Company and the plaintiff in this action are separate and distinct corporate entities.

6. That the allegations contained in paragraph 6 of said further answer and defense are untrue and are, therefore, denied.

Further Reply

As a further reply to the said defense attempted to be set up by the defendants, this plaintiff alleges and avers:

1. That if the defendants are attempting to rely for their defense in this action upon Section 2593 (d) of the North Carolina Code, and being Section 3, Chapter 275, Public Laws of North Carolina, 1933, this plaintiff says that said Section cannot and does not apply as a defense in this case; in that, the said act was passed at the 1933 Session of the General Assembly of the State of North Carolina, and the notes sued on in this action by the plaintiff were executed by the defendants on or about the 15th day of August, 1928.

2. That this plaintiff draws in question the validity of Section 3, Chapter 275, Public Laws of North Carolina, 1933, on the ground that it is in violation of and repugnant to the provisions of Article 1, Section 10 of the Constitution of the United States, in that said law impairs the obligation of contract entered into by and between the plaintiff and the defendants, and which contract is dated prior to the passage of said act, and in that at the time of [fol. 9] the passage of said act and prior thereto this plaintiff had the right in law to proceed to recover a judgment personally from the defendants for the full amount of said indebtedness, and the effect of said act is to deprive the

plaintiff of this right; and plaintiff draws in question the validity of said act on the further ground that it is repugnant to the provisions of the 5th Amendment to the Constitution of the United States in that it deprives the plaintiff of a property right vested in said plaintiff prior to the passage of said act without due process of law and in violation of the terms of plaintiff's contract with defendants; and plaintiff draws in question the validity of said Section on the further ground that it is repugnant to and in violation of the provisions of Section 1 of the 14th Amendment to the Constitution of the United States, in that said act denies to this plaintiff the equal protection of the law, in that it eliminates certain rights of this plaintiff due to the fact that said plaintiff is the holder of a contract secured by a mortgage on real estate, whereas, the holder of like contracts under the same conditions wherein no mortgage was pledged as security retains their original rights without being affected by said act; and said plaintiff further draws in question the validity of said Act on the further ground that it is repugnant to the provisions of Article 1, Section 17 of the Constitution of the State of North Carolina, and Article 1, Section 35 of the said Constitution of the State of North Carolina, and Article 1, Section 7 of the Constitution of the State of North Carolina, in that said Act deprives this plaintiff of a property right established by contract and which was in full force and effect and which property right was vested in said plaintiff prior to the passage of said Act, and deprives this plaintiff of said rights without due process of law.

Wherefore, this plaintiff prays that it have relief as asked for in the complaint filed in this action.

[fol. 10] Harkins, Van Winkle & Walton; Attorneys for Plaintiff.

(Verified.)

Statement of Case on Appeal

This is an action brought in the General County Court, whereby the plaintiff is seeking to recover a deficiency judgment in the sum of $4,534.79, with interest from June 19, 1933. Defendants, as Executor, borrowed the sum of

$8,000.00, and gave a deed of trust and notes, covering certain property belonging to the estate, as security therefor. The property was foreclosed on June 19, 1933, and bid in for the benefit of the note-holders. The deficiency above referred to resulted from said foreclosure sale. Defendants offer evidence under Section 2593 (d) to show that the property was reasonably worth the amount of the debt, or in excess thereof, on the date of sale. The Judge of the General County Court held that the Act was constitutional, and submitted the case to the jury on the issues as shown in the record.

On exceptions and errors assigned, appeal was made to the Superior Court of Buncombe County, which said Court held the Act constitutional and affirmed the judgment of the lower Court. The only question involved in this appeal is whether or not C. S. 2593 (d), being Section 3, Chapter 275, Public Laws of North Carolina, 1933, is constitutional.

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

Statement of Evidence

Plaintiff's Evidence

OFFERS IN EVIDENCE

Plaintiff offers in evidence paragraph 1 of the complaint as follows:

"That the plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with its principal place of business at Richmond, Virginia."

Plaintiff offers in evidence the corresponding paragraph of the answer, in which above is admitted.

Plaintiff offers in evidence paragraph 2 of the complaint, as follows:

"That the defendant, Wachovia Bank & Trust Company, is a banking corporation organized and existing under and [fol. 11] by virtue of the laws of the State of North Carolina, with an office at Asheville, North Carolina, and the

defendant, Alexandra Garrett Johnston, is a citizen and resident of the State of North Carolina, and that the said defendants jointly are executors of the estate of Robert P. Johnston, deceased, and have at all the times hereinafter set forth been qualified as such executors and have been carrying on and attending to the duties as executors of said estate".

Plaintiff offers in evidence the corresponding paragraph 2 of the answer, in which above is admitted.

Plaintiff offers in evidence paragraph 3 of the complaint, as follows:

"That on or about the 15th day of August, 1928, the said defendants, as executors of the estate of Robert P. Johnston, deceased, borrowed from the State Planters Bank & Trust Company, of Richmond, Virginia, the sum of $8,000.00, and as evidence of said indebtedness executed their promissory negotiable notes in the aggregate amount of eight thousand dollars, said notes being payable over a period of years with the last and final payment of $6,400.00 becoming due on August 15, 1933, said notes so executed by the defendants bearing interest at the rate of six per cent per annum, payable semi-annually, and being evidenced by interest notes."

Plaintiff offers in evidence the corresponding paragraph 3 of the answer, in which that is admitted.

Plaintiff offers in evidence paragraph 4 of the complaint:

"That at the same time that the said defendants executed and delivered the above referred to promissory notes they also executed and delivered a deed of trust to David B. Harris and Tristram T. Hyde, Jr., Trustees, which said deed of trust was dated the 15th day of August, 1928, and by the terms of said deed of trust the said defendants pledged as security for said indebtedness of eight thousand dollars a certain tract or parcel of land, together with the improvements located thereon, situate in the City [fol. 12] of Asheville, County of Buncombe, and State of North Carolina, and being more particularly described as located on the eastern margin of Grove Street and being a part of the property conveyed to R. P. Johnston, et al., by deed dated December 14, 1905, and recorded in the office of the Register of Deeds for Buncombe County, North

Carolina, in deed book 141, at page 434; said deed of trust being of record in the office of the Register of Deeds for Buncombe County, North Carolina, in Deed of Trust Book 300, at page 87, and to which reference is made for further particulars as to the express terms thereof".

Plaintiff offers in evidence the corresponding paragraph 4 of the answer, in which that is admitted.

Plaintiff offers in evidence paragraph 5 of the complaint:

"That the said defendants, as executors of the estate of Robert P. Johnston, deceased, paid or caused to be paid on said principal indebtedness the sum of $1200.00, but defaulted in the payment of the principal indebtedness due on August 15, 1932, and also defaulted in the payment of the interest which became due on August 15, 1932, and because of the continued defaults of the said defendants in the payment of said indebtedness the said holder and owner of said notes called on the acting Trustee, David B. Harris, in said deed of trust, to foreclose the said property in accordance with the power of sale contained in said deed of trust, and thereupon declared the whole of said indebtedness due and payable as the said holder of said notes had the right to do in accordance with the express terms and conditions of said notes and deed of trust."

Plaintiff offers in evidence the corresponding paragraph 5 of the answer, in which above is admitted.

Plaintiff offers in evidence paragraph 6 of the complaint:

"That thereafter the said David B. Harris, acting Trustee, did advertise said property in accordance with the terms of said deed of trust and in accordance with the stat- [fol. 13] utory law of the State of North Carolina, and exposed the same to public sale on the 19th day of June, 1933, where and when the Madison Investment Company, Incorporated, a Corporation, became the last and highest bidder for the same at the price of $3,000.00, and ten days thereafter elapsing and no raised bid having been filed with the Clerk of the Superior Court of Buncombe County, as provided by the statutory law of the State of North Carolina, the said sale was confirmed and deed to the property was made to said Madison Investment Company, Incorporated."

Plaintiff offers in evidence corresponding paragraph 6 of the answer, in which the allegations are admitted.

Plaintiff offers in evidence paragraph 7 of the complaint:

"That out of the proceeds of said sale the said Trustee paid or caused to be paid advertising costs in the sum of $6.64, Court costs in the sum of $2.25, and Trustee's fee in the sum of $150.00, and making an aggregate amount of $158.89, and after deducting said sum so expended by the Trustee from the three thousand dollars, the price bid for said property, there remained to be credited on said notes and paid to said note-holders the sum of $2,841.11."

Plaintiff offers in evidence paragraph 7 of the answer, in which those allegations are admitted.

Plaintiff offers in evidence paragraph 8 of the complaint:

"That at the time of said foreclosure sale there was due on said indebtedness the principal sum of $6,800.00, together with the sum of $204.00 interest that matured on August 15, 1932, and also the sum of $192.00 of interest that matured on February 15, 1933, and making a total indebtedness due of $7,196.00, with interest thereon from February 15, 1933, to the date of sale, to-wit: June 19, 1933, which said interest amounted to $179.90, and making a total of principal and interest due on the date of said sale of $7,375.90; that after crediting on said amount due the sum of $2,841.11 realized from the sale of said property on June [fol. 14] 19, 1933, there remained due and payable as of said date the sum of $4,534.79, together with interest thereon from June 19, 1933, until paid, and although demand has been made upon the defendants for the payment of the same, they have refused and neglected to pay the same."

Plaintiff offers in evidence the corresponding paragraph 8 of the answer, in which those allegations are admitted.

Plaintiff offers in evidence paragraph 1 of amended answer:

"That the defendants are informed and believe, and so allege, that at the time of the foreclosure of the deed of trust mentioned in the complaint, to-wit: June 19, 1933, and prior to and since said date, the Richmond Mortgage and Loan Corporation was the owner and holder of the indebtedness secured by said deed of trust and which is the subject of this suit."

Plaintiff offers in evidence this note if there is no objection from the defendant, marked Plaintiff's Exhibit I.

Plaintiff offers in evidence deed of trust book 300, at page 87, which is the deed of trust from the defendants to David B. Harris, acting Trustee, dated August 15, 1928.

Plaintiff rests.

MOTION FOR JUDGMENT

Plaintiff, through its counsel, calls attention of the Court to the Reply filed in this cause whereby the question is raised as to the unconstitutionality of the Act which defendant pleads as a defense, and moves the Court that Judgment be rendered for the plaintiff.

Overruled—exception. This is plaintiff's Exception No. 1.

Defendant's Evidence

ADMISSION AS TO OWNERSHIP OF NOTES, ETC.

Counsel for plaintiff admits that plaintiff was the owner of the notes secured by the deed of trust at the time of foreclosure, and that Madison Investment Company became the purchaser of said property on behalf of the plaintiff.

[fol. 15] C. N. WALKER testified: I am an Assistant Trust Officer of Wachovia Bank & Trust Company, and have been since 1929. The property given as security for the indebtedness borrowed by the defendants from the plaintiff, and evidenced by the deed of trust and notes, is the property known as 44 Grove Street, in the City of Asheville. I have general supervision of the Trust Department of the Asheville Office of the Wachovia Bank & Trust Company, and I deal with and handle the real estate that comes into the possession of the Trust Department of said bank. The bank has acted as Executor of the Johnston estate since June 11, 1924, and the property known as 44 Grove Street was a part of the assets of this estate, and is the same property covered by the deed of trust offered in evidence by the plaintiff. I have had considerable experience in handling real estate, both for the Trust Department of the bank

and for various insurance companies and in my own business.

I have an opinion satisfactory to myself, as to the reasonable, fair market value of the property, covered by the deed of trust, on the 19th day of June, 1933. I would say that the property on that date was worth approximately $8,500.00.

Cross-examination:

We carried this property on the books of the Bank at the tax assessed valuation. I don't know what the money was used for that was derived from this loan, but my impression is that it was used for the purpose of paying off an old debt that was against the property. The estate owed the Bank certain money, but I don't think this money was used for the payment of the debt due the bank. This property is a house and lot located near the center of Asheville, and the lot has a frontage of 112 feet and approximately 200-foot depth. I would say that the land is worth from $50.00 to $60.00 a front foot, and that the building is worth from $3,000 to $3,500. The residence was formerly used as an office for a group of doctors, and I think it has been built for something like 40 years. It is an old residence, brick [fol. 16] construction, solid brick and substantial wood and plastered walls inside. It is not obsolete. At the time of foreclosure, we were getting about $30.00 to $35.00, but moved the tenant out because they would not pay the rent. My recollection is that it was assessed the year 1933 for taxes at $16,500.00, and the tax was figured at the prevailing rate. I don't know what the fire insurance premiums were, but I think they would run from eight to a hundred dollars. We didn't have an awful lot of repairs during the year 1933, but prior to that time we spent considerable money repairing the inside, and got a large rent for it, about $150 per month.

In 1933, we didn't get $30 or $35 a month all the time, and had to move the tenant out because she wouldn't pay the rent. I understand the figures in the complaint, as to the amount of the indebtedness, are correct. We gave the property up when there was only $7375.00 due on it, even though I thought it was worth $8500.00. We tried to get the Company not to foreclose, and the estate did not have any money to pay the indebtedness. We had not paid any-

thing since 1932, and over a year before the foreclosure. At the time of the foreclosure, the property wasn't bringing in enough money to pay the taxes and insurance premiums.

MR. L. L. MERCHANT testified: I have lived in Asheville 35 years, and I am a building contractor and have been engaged in that business for 30 years. During this time I have built most every kind of building. I have never built a solid brick wall building, but I have built many veneer brick buildings. I have examined the building at 44 Grove Street, in the City of Asheville, and I am familiar with the conditions as to building prices which prevailed on June 19, 1933, in and about the City of Asheville, and I have an opinion, satisfactory to myself, as to the replacement value of this building on June 19, 1933. I base that on the difference between today's costs and the costs of June, 1933. I would say the replacement cost of that building in June, [fol. 17] 1933, would be approximately 20% less than it is today, and which would be about $9,600.00. The building is an old building, I know to be at least 40 years old. It has solid brick 12-inch walls, tin roof, has five rooms and one bath, old fashioned construction. The building is in fair condition considering its age. I have an opinion as to the fair value of the building on June 19, 1933, and would place the sound value of that building at 25%, leaving the value at $2,400.00.

Cross-examination:

I would value this building on June 15, 1933, after taking into consideration the depreciation, at $2,400.00.

MR. A. G. CARVER testified: I have been in the real estate business in the City of Asheville for 10 or 11 years. I have examined the property known as 44 Grove Street, in the City of Asheville, and I have an opinion, satisfactory to myself, as to the value of that property known as 44 Grove Street, on June 19, 1933. I would place the value on the land at around $60.00 a foot, front foot, and the value of the building at $2,000.00.

Cross-examination:

I place the value of the land at $6,720.00 and the building at $2,000.00, which makes a total of $8,720.00.

J. E. DUNN testified: I have been in the real estate business in the City of Asheville, for 13 years, and I am familiar with the property known as 44 Grove Street, in the City of Asheville. I have an opinion as to its fair, reasonable value on June 19, 1933, and I would say the land was worth $50.00 a front foot and the building was worth $2250.00.

H. W. DYSART testified: I have lived in Asheville 20 years, and have been in the real estate business the last 9 years. I have examined the property known as 44 Grove Street, and have an opinion as to its reasonable, fair value on the 19th day of June, 1933. In my opinion, it was worth between $8,000 and $9,000.

[fol. 18] Cross-examination:

I believe it would be safer to say that the value of the property is $8,000.00, rather than $9,000.00.

R. P. BOOTH testified for defendant: I am in the real estate business in the City of Asheville, and have been for the past 14 years. I have heretofore been president of the Asheville Real Estate Board. I have examined the property known as No. 44 Grove Street, in the City of Asheville. I am President of the State Association of Real Estate Boards. I have an opinion as to the value of the property known as 44 Grove Street, as of June 19, 1933. I would say, in my opinion, the property is worth $50.00 a front foot, and the house is worth $3,000.00.

T. RAYSOR SALLEY testified for defendant: I am an officer of the Richmond Mortgage and Loan Corporation, the plaintiff in this action. I am familiar with the property

known as 44 Grove Street, in the City of Asheville. This property has been listed with realtors in the City of Asheville for sale and, I think, at the price of $8,500.00. We have printed a list with this property on it. I can't tell exactly what the sale price is until I look at the list. I will try to get a list from one of the realtors in Asheville.

Cross-examination:

I am familiar with the property known as 44 Grove Street, although I have not inspected it for several years. I have an opinion as to the value of the property in June, 1933, and I would say it was $6,000.00. I think when it was foreclosed it was renting for about $25.00 a month.

Redirect examination:

"Q. Would you read from that listing what it relates to number 44 Grove Street in the City of Asheville?

Objection—overruled—exception.

A. 44 Grove Street. Lot 112 x 293. 8 room-, 2-story brick, four bedrooms, two baths, reception room, living and [fol. 19] dining rooms, kitchen. Can have three room and bath apartment. Dirt basement, hot water heat, out houses, good garden space, plenty of garage space.

Tax reference: Ward four, Sheet 2, Lot 24.
Tax valuation: 1932 $16,500
1933 .....

Sale price: $12,500"

MOTION TO STRIKE

Motion to strike out answer—motion denied—exception —this is plaintiff's Exception No. 2.

Defendant rests.

RENEWAL OF MOTION FOR JUDGMENT

At the close of defendants' evidence, the plaintiff renews its motion for judgment on the pleadings, contending that

the Act under which the defense is made is unconstitutional. Motion overruled—exception—this is plaintiff's Exception No. 3.

J. C. DILLARD testified for plaintiff (in rebuttal): I have been engaged in the real estate business in the City of Asheville for approximately 12 years, and have had a great deal of experience in the appraising of property located in Asheville. I am familiar with, and have inspected the property known as 44 Grove Street, and I have an opinion, satisfactory to myself, as to its true value on June 15, 1933. In my opinion, the land was worth $50.00 a front foot, or $5,600.00, and the building is of practically no value, I would say it was worth not over $1200.00, and the whole property is worth, in my opinion, $6,800.00. I arrive at this by allowing 2% obsoleseence on the building over a period of 30 years. The rent of the property has to be taken into consideration in making up its present value.

Cross-examination:

I know Mr. L. L. Merchant, and I know his reputation as a builder and I consider he knows what he is talking about when he states the value of a building.

MR. JAMES CARROLL testified for plaintiff: I am District Appraiser for the Home Owners' Loan Corporation, and [fol. 20] I am familiar with the values of properties in the City of Asheville. I have made an inspection and appraisal of the property known as 44 Grove Street, in the City of Asheville, and I have an opinion satisfactory to myself as to the value of this property on June 15, 1933. In my opinion the property was worth, on that date, the sum of $6108.00. I will explain to the Court how I arrived at this appraisal. The property is in transition from residence to business property and the section is building up about 90%. In my opinion the land is valued at $5600.00, or at $50.00 a front foot. It is an old building, and I figured the square footage. The effective age of the building was 30 years; the total depreciated replacement value is $7,574.00, and then I take into consideration the rental value

of the property, which I placed at $35.00 per month, capitalizing the whole valuation at $18,324.00, and dividing it by ⅓, I arrived at the present valuation of $6,108.00.

Cross-examination:

There is a garage on the property in a dilapidated condition. There is space for four cars. I valued the land at $5600.00 and the summation value of the building at $508.00. I consider L. L. Merchant a safe, sound builder, and I do not believe Mr. Merchant or I either are infallible in our judgment. I would take his value rather than mine.

Redirect examination:

The method I used in arriving at the value is an approved method of appraisal.

Mr. Plott Boyd testified for plaintiff: I have lived in the City of Asheville for 20 years, and have been engaged in the real estate business for that length of time. I am a member of the City Council for the City of Asheville. I am familiar with the property known as 44 Grove Street in the City of Asheville, and have an opinion as to its true value on June 15th, 1933. In my opinion the property was worth, on that date, $6,108.00. I used the same method in arriving at this valuation as was used by Mr. James Carroll.

[fol. 21] Cross-examination:

In my opinion, the land is worth $5600.00 and, on the basis of our appraisal, this would make the building worth $508.00.

Plaintiff rests.

Renewal of Motion for Judgment

At the close of all the evidence plaintiff renews its motion for judgment against the defendant, contending that the Act, which is Section 2593 (d) of the North Carolina Code, is unconstitutional, and under which Act the defendant put on its evidence as to the valuation of the property.

Overruled—exception. This is plaintiff's Exception No. 4.

ISSUES

1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on June 19, 1933?

Answer. $7375.90.

2. Did the plaintiff either directly or indirectly become the purchaser of the property at the foreclosure sale?

Answer. Yes.

3. What was the property sold fairly worth at the time and place of sale?

Answer. $8,000.00.

4. What amount was unpaid on the note described in the complaint after all credits have been allowed immediately subsequent to the sale on June 19, 1933?

Answer. $4,534.79, with interest from June 19, 1933.

Upon the tendering of the foregoing issues, and in apt time, counsel for plaintiff objected to the submission of issues 2 and 3.

Objection overruled—exception. This is plaintiff's Exception No. 5.

[fol. 22] JUDGE'S CHARGE

Gentlemen of the jury, this is an action brought in this court by the Richmond Mortgage Company against the Wachovia Bank & Trust Company and Mr. Johnston, executors of the Will of the late R. P. Johnston, which plaintiff is seeking to recover the balance which he alleges is due upon a loan of money made by the plaintiff to the defendants in 1928. Plaintiff makes certain allegations in the complaint. Some of them are denied by the defendants and the defendants set up as a further answer that the plaintiff in foreclosing on the security pledged for the loan did not give to the defendant the credit for the fair value of the property taken under the foreclosure of the suit.

There are four issues which arise upon the pleadings. These issues or questions are submitted to you by the court for you to answer as you find the facts to be from the evidence, and by its greater weight. The first issue is: "What

was the amount of the indebtedness secured by the deed of trust described in the Complaint on June 19, 1933?"

The Court instructs you that——

(Interrupted.)

Mr. Bernard: I suggest Your Honor answer those questions.

Court: You don't want an instruction in the record about it. You don't want any instruction in the record about the issues.

Mr. Bernard: As to one, two and four Your Honor might answer those from the admissions.

Court: Gentlemen, there is no controversy about the first issue, if you believe the evidence and find the facts as shown by all the evidence, you will answer the first issue $7,375.90. I penciled that answer in here for you.

Mr. Bernard: Just so they can add the figures.

Court: The second issue is: "Did the plaintiff either directly or indirectly become the purchaser of the property at the foreclosure sale?"

If you find the facts to be as testified to by the witnesses [fol. 23] and shown by all the evidence, you will answer that issue Yes. I have written that answer for you.

The fourth issue is: "What amount was unpaid on the note described in the complaint after all credits have been allowed immediately subsequent to the sale on June 19, 1933?"

Gentlemen, there is no controversy about the fourth issue, if you believe the evidence and find the facts as shown by all the evidence you will answer the fourth issue $4,534.79. I penciled the answer in here for you.

(A) The third issue is: "What was the property sold fairly worth at the time and place of sale?"

Upon the issue the burden is upon the plaintiff to satisfy you, by the greater weight of the evidence, that the property was worth, not in excess of the amount of the indebtedness and it contends it was not worth in excess of the amount of the debt at the time of the foreclosure on June 19, 1933, and the amount of the debt on that date was $7,375.90.

Plaintiff contends the fair value of the property on that date was less than that amount or not in excess of it.

Plaintiff has offered you the evidence of the allegations which are admitted, that is, as to the amount of the indebtedness and default in the payment of the debt. Plaintiff contends now that you should find from this evidence, and by its greater weight, that the value of the property was not in excess of six thousand dollars, and offers you the evidence of James Carroll and Plott Boyd and T. Raysor Salley, and other witnesses; then the plaintiff contends that it has shown you here by evidence which it says should satisfy you that after advertising this property, after it was in default, for 30 days, it was sold at public sale at the court house door and nobody then was willing to pay on June 19, 1933, in excess of $3,000.00 for it and in order to protect itself that the plaintiff, through a subsidiary corporation, the Madison Investment Company, purchased the property [fol. 24] at the sale for $3,000.00, there being no higher bid offered for it. The plaintiff contends it loaned money to the defendants in the sum of $8,000 in 1928, and that the defendants never did pay back on that loan more than $1,200 and some interest and that at the time of the sale alleged in the complaint that the loan was in default for over a year, both in principal and interest and that after it had made due efforts to collect the amount of the note from the defendants, it then undertook to collect the money out of the security which had been pledged by the defendants by way of deed of trust to secure payment of the money and after giving the notice required in the deed of trust by advertising the property thirty days in a newspaper published in this Coun[illegible] that the property was sold at the Court House Door at public sale on a date set, June 19, 1933, and at that sale it only brought $3,000.00, and after deducting certain expenses of the sale, the balance was credited on the note which left them the amount still unpaid $4,534.79, together with interest from June 19, 1933, so plaintiff contends that the property is old property situated on Grove Street, in this City, that it is a residential property and there is no demand for such property and that you should find from this evidence, and by its greater weight, the burden being upon the plaintiff to satisfy you, that the value of the property, that is the true or fair value of it, the fair worth of it, on the date of the sale on June 19, 1933, was less than the amount of the indebtedness at that time of $7,375.90.

Now, the defendant contends, on the other hand, you should not so find, that you should not be satisfied by the greater weight of the evidence that the property was worth any less than the amount of the debt. Defendant contends it was worth considerably more, that its fair value or true value was some considerable amount in excess of the amount of the indebtedness at that time, and the defendants contend it was worth at least the sum of $8,000.00 or $8,500.00.

Defendants offer you the evidence of certain of their wit- [fol. 25] nesses, C. N. Walker, Assistant Trust Officer of the defendant, Wachovia Bank & Trust Company, who testifies here that he has had experience in real estate deals and has been assistant Trust Officer handling real estate holdings of the bank and the real estate handled by the Trust Department of the bank and in his opinion the fair value of the property on the date of the sale was $8,500.00.

L. L. Merchant testified he had inspected the premises and he is a building contractor here of about 30 years experience, and he tells you the value he placed upon the property today and then the value of the property as of the date of the sale.

Then the defendants offer the testimony of A. G. Carver, real estate and insurance man here, who says he has had ten or eleven years experience, and in his opinion the fair value of the property was sixty dollars per front foot for the 112 feet or $6,720.00, and the house on the property is valued at $2,000.00, making $8,720.00.

Defendants offer you the testimony of J. E. Dunn, real estate dealer, with 13 years experience, as he testifies. He tells you in his opinion the fair value of the property was $50 per front foot or $5600.00 and the building on the premises was of the fair value of $2250.00.

Then the defendants offer you the testimony of H. W. Dysart, real estate dealer, with 9 years experience, as he tells you, and he gives you as his opinion of the fair value of the property on the date of the sale from $8,000 to $9,000.

Mr. R. P. Booth testified for the defendant that he is a real estate man, with 14 years experience and in his opinion the fair value of the property on the date of the sale was $50.00 per front foot and the building $3,000. For the plaintiff, Mr. Dillard testified that the land was of the value of $50.00 per front foot and the house $1,200.00.

Mr. Salley testified for the defendant that in his opinion the fair value of the property was $6,000.00, as I recall it, [fol. 26] but you will not take the Court's recollection about what the witnesses testify. You rely upon your own recollection as to what these witnesses have said. I am reviewing the evidence for your benefit, if it aids you in recalling the testimony, but you will not take my recollection for it. You consider all the testimony and weigh it, give to it the weight you find it is entitled to, after you consider it, under the instructions of the Court.

Now, the fair value or true value is in legal terms sometimes used by the courts, it is not the last dollar the property will bring or what the property might bring under any special circumstances or in the hands of any special dealer or owner, but it is the fair and reasonable market value of the property—that is, what a man of ordinary prudence who owned the property would sell it for or would be willing to sell it for if he was not obliged to sell it to another man of reasonable prudence and intelligence who wanted to buy the property but was not obliged to buy it, not obliged to have it, what those two men would get together and agree upon would be the fair market value of the property or fair worth of it, true value, as the law defines the true value.

You have heard the property described here by the witnesses as a house something in excess of 30 years old, brick house with 12-inch solid brick walls, 5-rooms on the first floor and 3 rooms on the second floor, with baths, and other conveniences for a house of that size, with a lot of 112 ft. frontage by 200 ft. deep, on Grove Street, in the City of Asheville, on which witnesses tell you here is a street on which there is located within a 100 yards of this property the old Meriwether Hospital, now known as Cherokee Inn, several residences and a new Y. W. C. A. building and within a short distance of the main part of the town, and the defendants contend for the reason of the location, even though, defendants contend, you should find the house is an old house and been built a long time, that still it is within territory which would necessarily make it of com- [fol. 27] mercial value, but you are not to consider what its special value would be, but only what its fair market value was on the date of the foreclosure sale, June 19, 1933.

You will consider the testimony of all the witnesses, what they have said about the property, descriptions of it, and

age, and then you find from the evidence what you believe its fair reasonable market value was under the definition the Court has given you.

The burden is upon the plaintiff to satisfy you of its contentions about this matter, and if the plaintiff has satisfied you, by the greater weight of the evidence, that the property is such that it would not have the value in excess of $6,000.00 then you would answer this issue in just such amount as plaintiff has satisfied you, by the greater weight of the evidence, that was the fair market value of the property on the date of the sale, that is, June 19, 1933.

Gentlemen, you are the sole judges of the facts in this case; you are the sole judges; it is your exclusive province to find the facts and to weigh the evidence, and you are the sole judges of the credibility of the witnesses and the weight you will give to their testimony.

The weight of the testimony is not determined entirely by the number of witnesses who testify to a particular fact, but it is determined by the faith and credit you give to the testimony of the witnesses. It is proper for you to consider, in that connection, the demeanor of the witnesses on the stand, his bias or interest, if any appears, the testimony in corroboration or contradiction of the witnesses, if any, consider the witnesses' source of obtaining the facts about which he testified, his ability to see and observe and report accurately what he sees. It is upon this basis that you determine the weight of the testimony. It is a matter of what degree of conviction the testimony of the witnesses produce upon your minds as fair and impartial jurors.

Witnesses who are interested in the result of your ver- [fol. 28] dict, if you find any are, you should scrutinize the testimony of such witnesses, but having done that, if you believe that witness is telling the truth, you would give to the testimony of such witness the same weight you would that of a disinterested witness.

You are the sole judges of what witness you will believe and what witness you will not believe, what part of the testimony of any witness you will believe or disbelieve, but it is your duty to consider and weigh all the testimony, to consider the argument of counsel and to apply the law as given you by the Court, then find the facts from the evidence as you recall it, and as you find the facts you will answer this issue.

The Court has answered the first, second and fourth issues for you by consent of counsel, so the only issues you are interested in answering here is the third issue. You will answer that issue in just such amount as you find by the greater weight of the evidence in this case is the fair or was the fair market value of the property or the true value of the property on the date of the sale on June 19th, 1933.

The greater weight of the evidence is that evidence which outweighs and preponderates all the other evidence, not whether the evidence is elicited from the plaintiffs' witnesses or defendants' witnesses, but it is the greater weight of the evidence, preponderance of all the evidence.

Whatever amount you find by the greater weight of the evidence in this case, you will answer this third issue in that amount.

Plaintiff contends you should answer it not to exceed six thousand dollars, and the burden is upon the plaintiff to satisfy you by the greater weight of the evidence of its contentions in order that you may answer that issue according to the contentions of the plaintiff. If the plaintiff has not satisfied you of such evidence and by its greater weight, then you will proceed to answer the issue in such amount as you are satisfied by the greater weight of the evidence was the true value of the property, fair market [fol. 29] value of the property as it has been defined to you, on the date of the sale.

(Addressing Counsel: Gentlemen, if I have overlooked any contention, I will be glad to state it for you.) (No response.)

You may take the issues and retire and make up your verdict and return it to the courtroom as soon as you have answered that issue.

Gentlemen, before you consider this case and answer that issue, I want to correct one part of the charge I gave you and to add to it—I told you that the burden of proof was on the plaintiff to satisfy you by the greater weight of the evidence of its contention that the property was not worth in excess of six thousand dollars. That is true to that extent, but not any further. The burden of proof in this case and on that issue is really upon the defendants to satisfy you by the greater weight of the evidence of

their contentions that the property was fairly worth the amount of the debt.

The statute says it shall be competent and legal for the defendant against whom such deficiency judgment is sought to allege and show, that is, the defendant must set out in his complaint (answer) and must show you by the greater weight of the evidence as a matter of defense that the property was fairly worth the amount of the debt secured by it at the time and place of the sale or that the bid was substantially less than its true value, so the burden is upon the defendants in this case, the Wachovia Bank & Trust Company, and its co-defendant, Mr. Johnson, to satisfy you by the greater weight of the evidence that the value of the property, fair value, or fair worth, or true value on the date of the sale was equal to the debt on the day of the sale or in excess of it. Just whatever amount you are satisfied from all this evidence in this case was the true value of the property on that date you will answer that issue, but the burden is on the defendants to satisfy you by the greater weight of the evidence of their contentions that the property at the time was of the fair value which [fol. 30] was equal to the amount of the debt as you see in the answer to the first issue. With that correction, you may retire and consider the case and return your verdict. (B.)

The plaintiff excepts to the giving of so much of the charge between the letters (A) and (B) and as refers to the third issue, and assigns error. This is plaintiff's Exception No. 6.

IN GENERAL COUNTY COURT OF BUNCOMBE COUNTY

JUDGMENT

This cause coming on to be heard before His Honor, J. P. Kitchin, Judge of the General County Court of Buncombe County, and a jury, and being heard, and the jury having answered the issues as follows:

1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on June 19, 1933?

A. $7,375.69.

2. Did the plaintiff either directly or indirectly become the purchaser of the property at the foreclosure sale?
A. Yes.

3. What was the property sold fairly worth at the time and place of sale?
A. $8,000.00.

4. What amount was unpaid on the note described in the complaint after all credits have been allowed immediately subsequent to the sale on June 19th, 1933?
A. $4,534.79:

and said issues having determined that the property described in the pleadings was fairly worth more than the amount of the debt due from the defendants to the plaintiff at the time of sale:

It is Therefore Ordered and Adjudged that the plaintiff take nothing by its action and that the defendants go hence without day and recover of the plaintiff their costs in this action incurred.

It is Further Ordered and Adjudged that the plaintiff pay the costs of this action to be taxed by the Clerk.

[fol. 31] This the 26th day of January, 1935.

J. P. Kitchin, Judge, General County Court, Buncombe County.

APPEAL ENTRIES

Upon the coming in of the foregoing judgment the plaintiff moves the Court for judgment notwithstanding the verdict, which motion is overruled and plaintiff excepts to the signing of the foregoing judgment and, in open court, gives notice of appeal to the Superior Court of Buncombe County for errors assigned and to be assigned. Further notice waived. Appeal bond in the sum of $25.00 adjudged sufficient. Plaintiff allowed 40 days in which to serve case on appeal upon defendant, and defendant allowed 40 days thereafter in which to serve countercase.

J. P. Kitchin, Judge, General County Court, Buncombe County.

This is plaintiff's Exceptions Nos. 7 and 8.

In General County Court of Buncombe County

Assignments of Error on Appeal from General County Court to the Superior Court

Plaintiff appellant respectfully assigns the following errors, as having been committed by the Court in the trial of this action:

First Assignment of Error

To the action of the Court in overruling the plaintiff's motion for judgment on the pleadings after the close of plaintiff's evidence. Exception No. 1, R. p. 14.

Second Assignment of Error

To the action of the Court in refusing to sustain the exception to a question asked witness, and refusal to strike out the answer. Exception No. 2, (R. p. 19).

Third Assignment of Error

To the action of the Court in overruling the plaintiff's motion for judgment on the pleadings at the close of defendants' testimony. Exception No. 3, (R. p. 19).

Fourth Assignment of Error

To the action of the Court in refusing to render judgment [fol. 32] in favor of the plaintiff and on the pleadings at the close of all the evidence. Exception No. 4, (R. p. 21).

Fifth Assignment of Error

To the action of the Court in submitting, over plaintiff's objection, Issues Nos. 2 and 3, as appear in the record. Exception #5, (R. p. 21).

Sixth Assignment of Error

To the charge of the Court between the letters (A) and (B) as appear in the record, and which charge was on the issue No. 3 as appears in the record. Exception No. 6, (R. pp. 23 to 30).

Seventh Assignment of Error

To the action of the Court in signing the judgment as appears in the record. Exception No. 7, (R. p. 31).

Eighth Assignment of Error

To the refusal of the Court for judgment in favor of the plaintiff notwithstanding the verdict as appears in the record. Exception No. 8, (R. p. 31).

This the 5th day of March, 1935.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff.

Service of the foregoing case on appeal accepted and the receipt of a copy thereof in apt time is acknowledged, this March 5th, 1935.

Parker, Bernard & DuBose, Attorneys for Defendants.

In Superior Court of Buncombe County

Judgment

This cause coming on to be heard, and being heard before His Honor, John M. Oglesby, Judge presiding over the Superior Courts of the 19th Judicial District, at the August Term, 1935, of the Superior Court of Buncombe County, upon the appeal of the plaintiff, Richmond Mortgage & Loan Corporation, from the judgment entered in the General County Court of Buncombe County, and the exceptions filed by the plaintiff as appear in the record, and each of said exceptions having been duly considered separately, the [fol. 33] following rulings thereon have been made by the undersigned Judge:

Exception and assignment of error No. 1 is not sustained;

Exception and assignment of error No. 2 is not sustained;
Exception and assignment of error No. 3 is not sustained;
Exception and assignment of error No. 4 is not sustained;
Exception and assignment of error No. 5 is not sustained;
Exception and assignment of error No. 6 is not sustained;
Exception and assignment of error No. 7 is not sustained;
Exception and assignment of error No. 8 is not sustained.

It is therefore ordered, adjudged and decreed that the judgment of the General County Court, and as rendered in the above cause at the January Term, 1935, be and the same is hereby in all respects affirmed.

It is further ordered, adjudged and decreed that the defendants recover of the plaintiff their costs herein incurred to be taxed by the Clerk, and that the Clerk of this Court certify a copy of this judgment to the General County Court of Buncombe County.

This 19th day of August, 1935.

John M. Oglesby, Judge Presiding.

Appeal Entries

The plaintiff objects and excepts to the action of the Court in not sustaining its assignments of error to the Superior Court, and to the overruling of each and every of said assignments of error and exceptions, and excepts to the signing and entry of the foregoing judgment, and gives notice of appeal in open Court to the Supreme Court of North Carolina. Further notice waived.

Appellant allowed to the 10th day of September in which to serve on appellees case on appeal, and appellees allowed 10 days thereafter in which to serve countercase on appeal. Appeal bond for costs in the sum of $75.00 adjudged to be [fol. 34] sufficient.

John M. Oglesby, Judge Presiding.

In Superior Court of Buncombe County

Plaintiff Appellant's Assignments of Error on Appeal to the Supreme Court

The plaintiff appellant respectfully assigns the following errors as having been committed by the Superior Court in the hearing of this case on appeal in said Court from the General County Court:

Assignment of Error No. 1

To the action of the Superior Court in not sustaining plaintiff's first assignment of error on appeal from the General County Court to the Superior Court, (R. p. 14) which assignment of error is in words and figures as follows:

"First Assignment of Error: To the action of the Court in overruling plaintiff's motion for judgment on the pleadings at the close of plaintiff's evidence as shown by Exception No. 1, (R. p. 14.)"

Assignment of Error No. 2

To the action of the Superior Court in not sustaining plaintiff's second assignment of error on appeal from the General County Court to the Superior Court, (R. p. 19), which assignment of error is in words as follows:

"Second Assignment of Error; To the action of the Court in refusing to sustain the exception to a question asked witness and refusal to strike out answer. Exception No. 2, (R. p. 19)."

Assignment of Error No. 3

To the action of the Superior Court in not sustaining plaintiff's third assignment of error on appeal from the General County Court to the Superior Court (R. p. 19), which assignment of error is in words and figures as follows:

"Third Assignment of Error: To the action of the Court in overruling plaintiff's motion for judgment on the pleadings at the close of defendants' testimony, Exception No. 3, (R. p. 19)."

[fol. 35] Assignment of Error No. 4

To the action of the Superior Court in not sustaining plaintiff's fourth assignment of error on appeal from the General County Court to the Superior Court. (R. p. 21), which assignment of error is in words as follows:

"Fourth Assignment of Error: To the action of the Court in refusing to render judgment in favor of the plaintiff, and on the pleadings, at the close of all the evidence. Exception No. 4, (R. p. 21)."

Assignment of Error No. 5

To the action of the Superior Court in not sustaining plaintiff's fifth assignment of error on appeal from the

General County Court to the Superior Court (R. p. 21) which assignment of error is in words as follows:

"Fifth Assignment of Error: To the action of the Court in submitting, over plaintiff's objection, issues Nos. 2 and 3, as appear in the record. Exception No. 5, (R. p. 21)."

Assignment of Error No. 6

To the action of the Superior Court in not sustaining plaintiff's 6th assignment of error on appeal from the General County Court to the Superior Court, (R. p. 23 to 30); which assignment of error is in words and figures as follows:

"Sixth Assignment of Error. To the charge of the court between the letters A and B as appear in the record, and which charge was on the issue No. 3 as appears in the record. Exception No. 6, (R. pp. 23 to 30)."

Assignment of Error No. 7

To the action of the Superior Court in not sustaining plaintiff's 7th assignment of error on appeal from the General County Court to the Superior Court, (R. p. 31), which assignment of error is in words as follows:—

"Seventh Assignment of Error: To the action of the Court in signing the judgment as appears in the record. Exception No. 7, (R. p. 31)."

[fol. 36] Assignment of Error No. 8

To the action of the Superior Court in not sustaining plaintiff's 8th assignment of error on appeal from the General County Court to the Superior Court, (R. p. 31) which assignment of error is in words as follows:

"Eighth Assignment of Error: To the refusal of the Court for judgment in favor of the plaintiff notwithstanding the verdict as appears in the record. Exception No. 8, (R. p. 31)."

Assignment of Error No. 9

To the action of the Superior Court in signing the judgment as set out in the record. (R. p. 33).

This the — day of August, 1935.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff.

IN SUPERIOR COURT OF BUNCOMBE COUNTY

STIPULATION AS TO RECORD

It is stipulated and agreed by and between counsel that this action was properly instituted and that the caption in the record shows all and the proper parties to said action: that the foregoing statement of case on appeal was served in apt time and that the foregoing constitutes the agreed statement of case on appeal and that summons, formal parts of the pleadings and verifications thereof need not be copied into the record.

This the 19th day of August, 1935.

Harkins, Van Winkle & Walton, Attorneys for Plaintiff. Parker, Bernard & DuBose, Attorneys for Defendant.

Cash Appeal Bond.

Transcript Certified by Clerk Superior Court.

[fol. 37]

Copy

IN SUPREME COURT OF NORTH CAROLINA

LOAN CORPORATION

v.

TRUST CO.

210 N. C., 30

Appeal by plaintiff from Oglesby, J., at August Term, 1935, of Buncombe. Affirmed.

OPINION

This is an action to recover judgment for the amount due on certain notes which were executed by the defendants and are now owned by the plaintiff.

The action was begun in the general county court of Buncombe County on 18 June, 1934. The facts admitted in the pleadings are as follows:

On 15 August, 1928, the defendants executed and delivered to the State-Planters Bank of Richmond, Virginia, their promissory notes aggregating in amount $8,000.00. The consideration for said notes was the sum of $8,000.00, which was loaned to the defendants by the State-Planters Bank on or about 15 August, 1928. The said notes, with interest at the rate of six per cent per annum from date, payable semi-annually, were due and payable from time to time until 15 August, 1933, when the last of said notes was due. At the date of the commencement of this action the plaintiff was the holder and owner of said notes.

Contemporaneously with the execution of said notes, and for the purpose of securing their payment, as they should severally become due, the defendants executed a deed of trust by which they conveyed to the trustees named therein a certain lot of land, together with the building located thereon, situate in the city of Asheville, Buncombe County, North Carolina. This deed of trust contained a power of sale by which, upon the default of the defendants in the payment of said notes as the same became due, and upon the request of the holder of said notes, the trustees were authorized and empowered to sell the lot of land described therein, and to apply the proceeds of the sale as a payment on said notes. The deed of trust was duly recorded in the office of the register of deeds of Buncombe County.

After they had paid the sum of $1,200.00 on the principal, and had also paid the interest which had accrued on said notes prior to 15 August, 1932, the defendants defaulted in the payment of principal and interest due at said date. Because of such default, and at the request of the plaintiff as the holder of said notes, the trustees named in the deed of trust, after fully complying with all its provisions, offered the lot of land described in the deed of trust for sale on 19 June, 1933. At said sale, the Madison Investment Company was the last and highest bidder for said lot of land in the sum of $3,000.00. This bid was not raised within ten days after the sale, and thereafter the trustees conveyed said lot of land to the Madison Investment Company, and applied the proceeds of the sale, to wit: The sum of $2,841.11, as a payment on the amount then due on said notes, to wit: The sum of $7,375.90, leaving the amount due on said notes at the date of the commencement of this action $4,534.79, with interest from 19 June, 1933.

On the facts admitted in the pleadings, the plaintiff demanded judgment that it recover of the defendants the sum of $4,534.79, with interest from 19 June, 1933, and the costs of the action.

[fol. 38] In their answer, in defense of plaintiff's recovery in this action, the defendants alleged that as the result of the sale of the lot of land described in the deed of trust securing the payment of the notes sued on in this action, on 19 June, 1933, and of its subsequent conveyance by the trustees pursuant to said sale, the plaintiff has become the owner of said lot of land; that the amount bid for said lot of land on 19 June, 1933, to wit: The sum of $3,000.00, was not its fair value at said date; and that at said date, the said lot of land was fairly worth the amount then due to the plaintiff on said notes.

The defendants prayed judgment that the plaintiff recover nothing in this action, and that they recover of the plaintiff their costs incurred in the action.

At the trial, the plaintiff admitted that the Madison Investment Company purchased the lot or parcel of land described in the deed of trust for and on behalf of the plaintiff, and that the plaintiff was the holder and owner of the notes secured by said deed of trust at the date of the sale.

Issues submitted to the jury were answered as follows:

"1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on 19 June, 1933?"

Answer. "$7,375.90."

"2. Did the plaintiff, either directly or indirectly, become the purchaser of the property at the foreclosure sale?"

Answer. "Yes."

"3. What was the property sold fairly worth at the time and place of the sale?"

Answer. "$8,000.00."

"4. What amount was unpaid on the notes described in the complaint after all credits have been allowed immediately subsequent to the sale on 19 June, 1933?"

Answer. "$4,534.79."

From judgment on the verdict that plaintiff recover nothing of the defendants, and that defendants recover of

the plaintiff their costs, the plaintiff appealed to the Superior Court of Buncombe County, assigning errors in the trial and in the judgment.

At the hearing of its appeal, neither of plaintiff's assignments of error was sustained.

From judgment affirming the judgment of the general county court, the plaintiff appealed to the Supreme Court, assigning as errors the refusal of the judge of the Superior Court to sustain its assignments of error on its appeal from the judgment of the general county court.

Harkins, Van Winkle & Walton for plaintiff.
Parker, Bernard & DuBose for defendants.

CONNOR, J.:

Chapter 275, Public Laws of North Carolina, 1933, is entitled "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust." The Act was ratified on 18 April, 1933, and has been in full force and effect since said date. It applies only to a sale made by a mortgagee or trustee under a power of sale contained in a mortgage, deed of trust, or other instrument, securing the payment of money. It does not apply to a sale made under an order, judgment, or decree in an action to foreclose a mortgage or deed of trust, or similar instrument. [fol. 39] In sections 1 and 2 of the Act it is provided that where real property has been offered for sale by a mortgagee, or by a trustee under the power of sale contained in a mortgage or deed of trust, and the sum bid at such sale is inadequate, and for that reason the consummation of the sale would be inequitable, because it would result in irreparable damage to the mortgagor or grantor in the deed of trust, or to any other person having a legal or equitable interest in the property, the mortgagor, or the grantor, or any other interested person, at any time before the consummation of the sale, may apply to a judge of the Superior Court for an order enjoining the consummation of the sale, and that in such case the judge of the Superior Court may enjoin the consummation of the sale, and may order a resale of the property by the mortgagee, by the trustee, or by a commissioner appointed by him for that purpose, upon such terms as he may deem just and equitable.

The validity of these sections of the statute was challenged in Woltz v. Deposit Co., 206 N. C. 239, 173 S. E. 587. The challenge was not sustained. It was held by this Court that sections 1 and 2 of the statute are valid, and were applicable to the facts in that case. This decision was approved in Hopkins v. Swain, 206 N. C., 174 S. E. 409, in Miller v. Short, 206 N. C., 732, 175 S. E., 135, and in Barringer v. Trust Co., 207 N. C., 505, 177 S. E. 795.

Speaking of sections 1 and 2 of the statute, it was said in Woltz v. Deposit Co., supra: "The statute does not violate any provision of the Constitution of the United States, or of the Constitution of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to the mortgage or to the deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. The statute is remedial only, and is valid for the purpose. It is applicable to a sale made since its enactment, although the sale was made under a power of sale contained in a mortgage or deed of trust executed prior to its enacement."

In the instant case, the validity of section 3 of the statute is challenged by the appellant on the ground that its enactment by the General Assembly of this State was in violation of section 10 of Article I of the Constitution of the United States, of the Fifth Amendment, and of section 1 of the Fourteenth Amendment of said Constitution, and was also in violation of sections 7, 17, and 35 of Article I of the Constitution of the State of North Carolina, in that said section impairs the obligation of the contract entered into by and between the plaintiff and the defendant prior to its enactment.

Section 3 of chapter 275, Public Laws of North Carolina, 1933, is as follows: "Sec. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee, or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment

against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom [fol. 40] such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent purchasers, nor shall it be held to affect or defeat the negotiability of any note, bond, or other obligation secured by such mortgage, deed of trust, or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judgment sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed.

The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

We are of the opinion that the statute is valid, and so hold.

The statute involved in this action is not "emergency legislation," nor is its purpose to provide a "moratorium" for debtors during a temporary period of depression. For this reason, the cases cited by appellant from other jurisdictions are not applicable in the instant case. The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. See Better Plan Building & Loan Asso. v. Holden (N. J.), 169 Atl., 289.

The statute is applicable in the instant case, and supports the judgment of the Superior Court. For that reason the judgment is

Affirmed.

Devin, J., took no part in the consideration or decision of this case.

[fol. 41] In Supreme Court of North Carolina, Buncombe County, Term, 1936

No. 113

Richmond Mortgage & Loan Asso.

vs.

Wachovia Bank & Trust Co. and Alexandra Garrett Johnston, Executors of Estate of Robt. P. Johnston, Dec'd.

Judgment—Filed April 29, 1936

This cause came on to be argued upon the transcript of the record from the Superior Court of Buncombe County:—upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is, therefore, considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Geo. W. Connor, Justice, be certified to the said Superior Court, to the intent that the judgment is affirmed.

And it is considered and adjudged further, that the plaintiff Mortgage & Loan Corp. do pay the costs of the appeal in this Court incurred, to-wit, the sum of Eighteen 60/100 dollars ($18.60) and execution issue therefor.

Edward Murray, Clerk of the Supreme Court.
(Seal.)
A True Copy.

[File endorsement omitted.]

[fol. 42] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

Considering itself aggrieved by the final decision and judgment of the Supreme Court of the State of North Carolina in the above entitled cause, the appellant therein, Richmond Mortgage & Loan Corporation, hereby prays that an appeal be allowed to the Supreme Court of the United States and for an Order fixing the amount of the bond thereon.

Dated July 9th, 1936.

Kester Walton, Counsel for Appellant.

[fol. 43] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

The above named appellant, Richmond Mortgage & Loan Corporation, believing itself aggrieved by the final decision and judgment of the Supreme Court of the State of North Carolina in the above entitled cause, and having

petitioned for an appeal to the Supreme Court of the United States, hereby assigns the following errors in the record and proceedings in the said case.

1

The Supreme Court of the State of North Carolina erred in refusing to find Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, unconstitutional and repugnant to Article 1, Section 10, of the Constitution of the United States because, as construed and applied to this appellant, it results in impairing the obligation of a contract entered into by the respondents and which said contract is owned by the appellant and which said contract [fol. 44] was entered into and executed prior to the passage of said above referred to Act.

2

The Supreme Court of North Carolina erred in holding Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, applicable in the above cause because, as construed and applied to this appellant, it resulted in depriving appellant of a judgment against the respondents to which it was entitled in accordance with the laws of the State of North Carolina at the time the contract which is the subject matter of the action was entered into.

3

The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court and in refusing to reverse said judgment upon the ground that the said Superior Court erred in affirming the judgment of the General County Court denying to the appellant the right to have judgment rendered in its favor and on the pleadings as filed in said cause and at the close of all the evidence.

4

The Supreme Court of the State of North Carolina erred in rendering a final judgment or decree against the appellant upon the 29th day of April, 1936 in the above entitled cause.

Dated July 9th, 1936.

Kester Walton, Counsel for Appellant.

[fol. 45] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAYER FOR REVERSAL

Considering itself aggrieved by the final decision and judgment of the Supreme Court of the State of North Carolina in the above entitled cause, the appellant, Richmond Mortgage & Loan Corporation, hereby files a petition for appeal to the Supreme Court of the United States and its assignment of errors, for which errors the said appellant, Richmond Mortgage & Loan Corporation, prays that said judgment of the Supreme Court of North Carolina, dated April 29th, 1936 in the above entitled cause, be reversed and a judgment rendered in favor of said appellant, and for costs.

Dated July 9th, 1936.

Kester Walton, Attorney for Appellant.

[fols. 46-48] Bond on appeal for $1,000.00, approved July 10, 1936, omitted in printing.

[fol. 49] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled suit, Richmond Mortgage & Loan Corporation, having prayed for the allowance for an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of North Carolina on the 29th day of April, 1936, and having presented and filed its petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and laws of the Supreme Court of the United States in such cases made and provided. And the undersigned, the Chief Justice of the Supreme Court of the State of North Carolina, being the highest court of the State in which a de-

cision in this suit could be had, having found that the appellant in said State Court of North Carolina drew in question the validity of a statute of the State of North Carolina on the ground of its being repugnant to the Constitution of the United States, and that the decision of the said State [fol. 50] Supreme Court of North Carolina was in favor of the validity of the said statute;

It is Now, Here, Ordered, that an appeal be, and the same is, hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of North Carolina in the above entitled cause, as provided by law; and it is further ordered that the Clerk of the Supreme Court of the State of North Carolina shall prepare and certify a transcript of the record, proceedings, and judgment in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within thirty (30) days of this date.

And it is Further Ordered that security for costs on appeal be fixed in the sum of One Thousand Dollars ($1,000.00) and that the appeal bond presented by said appellant for One Thousand Dollars ($1,000.00) be and the same is hereby approved.

Dated July 10th, 1936.

W. P. Stacy, Chief Justice of the Supreme Court of the State of North Carolina.

[fol. 51] In Supreme Court of the United States

[Title omitted]

Præcipe for Transcript of Record

The Clerk of the Supreme Court of the State of North Carolina, in preparing and transmitting the record in the above entitled cause to the Supreme Court of the United States, will include in the record the following:

1. The printed record in this cause in the Supreme Court of the State of North Carolina, pages 1 to 36, inclusive.
2. The opinion of the Supreme Court of the State of North Carolina, rendered on appeal in this cause.
3. The judgment of the Supreme Court of the State of North Carolina, entered April 29, 1936, affirming the judg-

ment of the Superior Court for Buncombe County in this cause.

4. The appellant's petition for appeal to the Supreme Court of the United States, assignment of errors, prayer [fol. 52] for reversal, appeal bond and the order of the Chief Justice of the Supreme Court of the State of North Carolina allowing the appeal to the Supreme Court of the United States, dated the 10th day of July, 1936, statement of jurisdiction under Rule XII, and this præcipe.

5. The citation on appeal to the Supreme Court of the United States and the proof of service thereof on the respondents, Wachovia Bank and Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, deceased, filed with you on the 10th day of July, 1936.

Dated 10th day of July, 1936.

Kester Walton, Counsel for Appellant.

Service of the foregoing præcipe acknowledged, this the 13th day of July, 1936.

S. G. Bernard, Attorney of Record for Wachovia Bank & Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, Deceased.

[fols. 53 & 54] Citation, in usual form, showing service on S. G. Bernard, omitted in printing.

[fol. 55] In Supreme Court of North Carolina

Richmond Mortgage & Loan Company

v.

Wachovia Bank & Trust Company and Alexander Garrett Johnson, Executors of Robt. J. Johnson, Deceased.

Appeal docketed 20 August, 1935.
Case argued 5 September, 1935.
Opinion filed 29 April, 1936.
Final judgment entered 29 April, 1936.

CLERK'S CERTIFICATE

I, Edward Murray, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that no petition to rehear has been filed, and that the time for filing such petition under the rules of this Court has expired.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this 17 July, 1936.

Edward Murray, Clerk of the Supreme Court of the State of North Carolina. (Seal of the Supreme Court of the State of North Carolina.)

[fol. 56] IN SUPREME COURT OF THE UNITED STATES

Statement of Points Relied Upon by Appellant and Designation of Portions of Record to be Printed—Filed July 28, 1936

STATEMENT OF POINTS RELIED UPON BY APPELLANT

Richmond Mortgage & Loan Corporation, appellant in the above entitled cause, in order to secure a reversal of the judgment appealed from, will rely upon the following points:

1. The Supreme Court of the State of North Carolina erred in refusing to find Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, unconstitutional and repugnant to Article 1, Section 10 of the Constitution of the United States, because, as construed and applied to this appellant, it results in impairing the obligation of a contract entered into by the respondents, and which said contract is owned by the appellant, and which said contract was entered into and executed prior to the passage of the above referred to Act.

[fol. 57] 2. The Supreme Court of North Carolina erred in holding Section 3, Chapter 275, of the Public Laws of

North Carolina, Session 1933, applicable in the above cause, because, as construed and applied to this appellant, it resulted in depriving appellant of a judgment against the respondents, to which it was entitled in accordance with the laws of the State of North Carolina at the time the contract, which is the subject matter of the action, was entered into.

3. The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court, and in refusing to reverse said judgment upon the ground that the said Superior Court erred in affirming the judgment of the General County Court, denying to the appellant the right to have judgment rendered in its favor and on the pleadings as filed in said cause, and at the close of all the evidence.

4. The Supreme Court of the State of North Carolina erred in rendering a final judgment and decree against the appellant upon the 29th day of April, 1936 in the above cause.

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

The Clerk of this Court will print the entire record in the above entitled cause, transmitted from the Supreme Court of the State of North Carolina.

Kester Walton, Counsel for Appellant.

We, the undersigned, attorneys for the appellee, consent to the foregoing designation of the parts of the record to be [fol. 58] printed. This the 13th day of July, 1936.

S. G. Bernard, Attorney for Wachovia Bank & Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, Deceased.

STATE OF NORTH CAROLINA,
County of Buncombe:

On this the 13th day of July, in the year of our Lord, One Thousand Nine Hundred Thirty-six, personally appeared Kester Walton, before me the subscriber, a Notary Public, in and for the County of Buncombe, State of North Carolina, and makes oath that he delivered a true copy of the within statement to S. G. Bernard, attorney for appellee, Wachovia Bank & Trust Company and Alexandra Gar-

rett Johnston, Executors of the Estate of Robert P. Johnston, deceased, on the 13th day of July, 1936.

Lorene Weaver, Notary Public, Buncombe County, N. C. My commission expires February 19, 1938. (Seal.)

[fol. 59] [File endorsement omitted.]

Endorsed on cover: File No. 40,775. North Carolina Supreme Court. Term No. 235. Richmond Mortgage & Loan Corporation, appellant, vs. Wachovia Bank and Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, deceased. Filed July 28, 1936. Term No. 235, O. T., 1936.

(8325-C)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE & LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK & TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED,
Respondents.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellant, through its counsel, respectfully moves the Court for leave to file, in the above cause, a supplemental Statement of Jurisdiction Under Rule XII, and in order that said Statement may comply with the rules as amended on March 2nd, 1936, and which become applicable to all petitions and appeals presented on and after July 1st, 1936.

Dated this the 24th day of July, 1936.

Respectfully submitted,

JOHN Y. JORDAN, JR.,
Counsel for Appellant.
KESTER WALTON,
Of Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE & LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK & TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED,
Respondents.

ON APPEAL FROM SUPREME COURT OF THE STATE OF NORTH CAROLINA.

SUPPLEMENTAL STATEMENT OF JURISDICTION UNDER RULE XII.

Appellant submits the following statement of the basis on which it is contended the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of the State of North Carolina:

(A.)

The Statutory Provisions Believed to Sustain the Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked under Section 237 (a) of the Judicial

Code, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937, United States Code, Ann., Title 28, Section 344.

The judgment of the Supreme Court of North Carolina is a final judgment in the suit under Article IV, Sections 2 and 8 of the Constitution of the State of North Carolina, and Sections 615, 658, 659, 1412 and 1314 of the North Carolina Code, as construed in *Chavis* v. *Brown*, 174 N. C., 122.

(B.)

The statute or act passed by the Legislature of the State of North Carolina, the validity of which is drawn in question and which it is contended is unconstitutional and repugnant to Article I, Section 10 of the Constitution of the United States, is Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, pages 402, 403, and which is quoted as follows:

> "SEC. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part; *Provided*, this section shall not affect nor apply

to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust, or other instrument; *Provided, further,* this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

(C.)

The Date of the Judgment and the Application for Appeal.

The decree and judgment sought to be reviewed was entered in the Supreme Court of the State of North Carolina on the 29th day of April, 1936. (Reported in 210 N. C. (Advance Sheets) page 29.) (Copy of opinion hereto attached.)

The petition for appeal, assignment of errors and prayer for reversal were presented to the Chief Justice of the Supreme Court of the State of North Carolina on the 10th day of July, 1936, and the order allowing said appeal was executed and the appeal bond approved on the 10th day of July, 1936. The citation on appeal was signed by him on the 10th day of July, 1936.

(D.)

Nature of the Case and Rulings Below.

The case was brought by appellant, a Virginia corporation, to recover judgment in the amount of four thousand five hundred thirty-four and 79/100 ($4,534.79) dollars with interest from June 19, 1933, the balance due on promissory notes executed by defendants (R. 4, paragraph 9).*

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* Refers to transcript of record from Supreme Court of North Carolina. Record in this case not yet printed.

At the time defendants executed said promissory notes, they also executed a deed of trust to a trustee, pledging as security for the payment of said promissory notes a house and lot located in the County of Buncombe, State of North Carolina. The promissory notes and deed of trust were dated and delivered on or about August 15, 1928 (R. 11 and 12—plaintiff's evidence and admissions of defendants).

Because of default in the payment of the indebtedness, appellant caused the property pledged as security for said indebtedness to be sold under the power of sale contained in the deed of trust on June 19, 1933 (R. 13—plaintiff's evidence and admissions of defendants). After crediting the amount received from said sale on the notes of the defendants, there remained due the sum sued for in this action, which action was instituted on June 18, 1934 (R. 1—date of summons).

At the trial of the cause in the General County Court of Buncombe County, the question was submitted to a jury as to the fair worth of the property at the time and place of the sale, and the jury answered the verdict in the amount of eight thousand ($8,000.00) dollars (R. 21—issues), and on such verdict the General County Court of Buncombe County adjudged that plaintiff was entitled to recover nothing of defendants (R. 30—judgment). It was admitted at the trial that the property was purchased directly or indirectly at the foreclosure sale by the appellant, who was then the owner of the indebtedness (R. 14—defendants' evidence).

In the pleadings filed in the cause it was alleged by the plaintiff that Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, was repugnant to the provisions of Article I, Section 10 of the Constitution of the United States in so far as applied to this appellant, because the notes sued on, together with the deed of trust securing the

same, were executed prior to the passage of said Act (R. 8 and 9—further reply).

At the close of plaintiff's evidence, plaintiff moved the Court for a judgment on the pleadings, calling attention to the reply whereby the question as to the unconstitutionality of the Act was pleaded. The motion was overruled (R. 14). The plaintiff objected to the submission of issues Nos. 2 and 3, relative to the purchase of the property and its worth at the time and place of sale, which objection was overruled and exception taken (R. 21). Plaintiff excepted and assigned error to so much of the judge's charge between the letters A and B (R. 23 to 30, inclusive). The procedure in the courts of the State of North Carolina and in the General County Court of Buncombe County, in which this case was tried, does not require the objection of counsel at the time the charge is given. North Carolina Code, 1935, Annotated, Section 564.

State v. *Matthews*, 78 N. C. 523;
State v. *Fulford*, 124 N. C. 798;
Commissioner of Banks v. *Florence Mills*, 202 N. C. 509;
State v. *Ray*, 207 N. C. 642.

The plaintiff moved the Court for judgment notwithstanding the verdict and objected to the signing of the judgment as entered, which motions were overruled (R. 31). From the judgment of the General County Court; plaintiff assigned errors on the exceptions heretofore referred to (R. 31).

On appeal to the Superior Court of Buncombe County, to which Court an appeal lies from the judgment of the General County Court (North Carolina Code, 1935, Annotated, Section 1608 (cc)), the plaintiff objected and excepted to the judgment of the Superior Court in not sustaining its assignments of error (R. 33) and objected to

the judgment of the court and appealed to the Supreme Court of North Carolina, assigning errors on the exceptions heretofore referred to (R. 33, 34, 35 and 36).

The Supreme Court of the State of North Carolina is the highest court in the State and that court entered final judgment, affirming the judgment of the Superior Court of Buncombe County, upholding the constitutional validity of the statute involved, and holding that such statute was applicable in the instant case. (See opinion attached.)

The appellant contends that the Act in question impairs the obligation of a contract entered into prior to the time of its passage, and is, therefore, unconstitutional and repugnant to Article I, Section 10 of the Constitution of the United States. The Supreme Court of the State of North Carolina considered the question as to whether or not the statute was unconstitutional as applied to this appellant in the instant case, and ruled that said Act did not impair the obligations of a contract entered into prior to its passage, but provided for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust.

(E.)

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal:

Fiske v. *Kansas*, 274 U. S. 380, 385;

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 288;

Kansas City Southern Railway Co. v. *Road Improvement District*, 266 U. S. 379, 385;

Cohens v. *Virginia*, 6 Wheat. 264, 5 L. Ed. 257.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and that the inquiry, then, is whether the statute is constitutional and as applied and enforced in respect to the instant case.

Respectfully submitted,

JOHN Y. JORDAN, JR.,
Counsel for Appellant.
KESTER WALTON,
Of Counsel for Appellant.

Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Company and Alexandra G. Johnson, Executors of Robert P. Johnson, Deceased.

Appeal by Plaintiff from Oglesby, J., at August Term, 1935, of Buncombe. Affirmed

This is an action to recover judgment for the amount due on certain notes which were executed by the defendants, and are now owned by the plaintiff.

The action was begun in the general county court of Buncombe County on 18 June, 1934. The facts admitted in the pleadings are as follows:

On 15 August, 1928, the defendants executed and delivered to the State-Planters Bank of Richmond, Virginia, their promissory notes aggregating in amount $8,000.00. The consideration for said notes was the sum of $8,000.00, which was loaned to the defendants by the State-Planters Bank on or about 15 August, 1928. The said notes, with interest at the rate of six per cent per annum from date, payable semi-annually, were due and payable from time to time until 15 August, 1933, when the last of said notes was due. At the date of the commencement of this action the plaintiff was the holder and owner of said notes.

Contemporaneously with the execution of said notes, and for the purpose of securing their payment, as they should severally become due, the defendants executed a deed of trust by which they conveyed to the trustees named therein a certain lot of land, together with the building located thereon, situate in the city of Asheville, Buncombe County, North Carolina. This deed of trust contained a power of sale by which, upon the default of the defendants in the payment of said notes as the same became due, and upon the request of the holder of said notes, the trustees were authorized and empowered to sell the lot of land described therein, and to apply the proceeds of the sale as a payment on said notes. The deed of trust was duly recorded in the office of the register of deeds of Buncombe County.

After they had paid the sum of $1,200.00 on the principal, and had also paid the interest which had accrued on said notes prior to 15 August, 1932, the defendants defaulted in the payment of principal and interest due at said date. Because of such default, and at the request of the plaintiff as the holder of said notes, the trustees named in the deed of trust, after fully complying with all its provisions, offered the lot of land described in the deed of trust for sale on 19 June, 1933. At said sale, the Madison Investment Company was the last and highest bidder for said lot of land in the sum of $3,000.00. This bid was not raised within ten days after the sale, and thereatfer the trustees conveyed said lot of land to the Madison Investment Company, and applied the proceeds of the sale, towit: The sum of $2,841.11, as a payment on the amount then due on said notes, to wit: The sum of $7,375.90, leaving the amount due on said notes at the date of the commencement of this action $4,534.79, with interest from 19 June, 1933.

On the facts admitted in the pleadings, the plaintiff demanded judgment that it recover of the defendants the sum of $4,534.79, with interest from 19 June, 1933, and the costs of the action.

In their answer, in defense of plaintiff's recovery in this action, the defendants alleged that as the result of the sale of the lot of land described in the deed of trust securing the payment of the notes sued on in this action, on 19 June, 1933, and of its subsequent conveyance by the trustees pursuant to said sale, the plaintiff has become the owner of said lot of land; that the amount bid for said lot of land on 19 June, 1933, to wit; The sum of $3,000.00, was not its fair value at said date; and that at said date, the said lot of land was fairly worth the amount then due to the plaintiff on said notes.

The defendants prayed judgment that the plaintiff recover nothing in this action, and that they recover of the plaintiff their costs incurred in the action.

At the trial, the plaintiff admitted that the Madison Investment Company purchased the lot or parcel of land described in the deed of trust for and on behalf of the plaintiff, and that the plaintiff was the holder and owner of the

notes secured by said deed of trust at the date of the sale.

Issues submitted to the jury were answered as follows:

"1. What was the amount of the indebtedness secured by the deed of trust described in the complaint on 19 June, 1933?" Answer: "$7,375.90."

"2. Did the plaintiff, either directly or indirectly, become the purchaser of the property at the foreclosure sale?" Answer: "Yes."

"3. What was the property sold fairly worth at the time and place of the sale?" Answer: "$8,000.00."

"4. What amount was unpaid on the notes described in the complaint after all credits have been allowed immediately subsequent to the sale on 19 June, 1933?" Answer: "$4,534.79."

From judgment on the verdict that plaintiff recover nothing of the defendants, and that defendants recover of the plaintiff their costs, the plaintiff appealed to the Superior Court of Buncombe County, assigning errors in the trial and in the judgment.

At the hearing of its appeal, neither of plaintiff's assignments of error was sustained.

From judgment affirming the judgment of the general county court, the plaintiff appealed to the Supreme Court, assigning as errors the refusal of the judge of the Superior Court to sustain its assignments of error on its appeal from the judgment of the general county court.

Harkins, Van Winkle & Walton for plaintiff.
Parker, Bernard & Dubose for defendants.

CONNOR, *J.*:

Chapter 275, Public Laws of North Carolina, 1933, is entitled "An act to regulate the sale of real property upon the foreclosure of mortgages or deeds of trust." The Act was ratified on 18 April, 1933, and has been in full force and effect since said date. It applies only to a sale made by a mortgagee or trustee under a power of sale contained in a mortgage, deed of trust, or other instrument, securing

the payment of money. It does not apply to a sale made under an order, judgment, or decree in an action to foreclose a mortgage or deed of trust, or similar instrument.

In sections 1 and 2 of the Act it is provided that where real property has been offered for sale by a mortgagee, or by a trustee under the power of sale contained in a mortgage or deed of trust, and the sum bid at such sale is inadequate, and for that reason the consummation of the sale would be inequitable, because it would result in irreparable damage to the mortgagor or grantor in the deed of trust, or to any other person having a legal or equitable interest in the property, the mortgagor, or the grantor, or any other interested person, at any time before the consummation of the sale, may apply to a judge of the Superior Court for an order enjoining the consummation of the sale, and that in such case the judge of the Superior Court may enjoin the consummation of the sale, and may order a resale of the property by the mortgagee, by the trustee, or by a commissioner appointed by him for that purpose, upon such terms as he may deem just and equitable.

The validity of these sections of the statute was challenged in *Woltz* v. *Deposit Co.*, 206 N. C., 239, 173 S. E., 587. The challenge was not sustained. It was held by this Court that sections 1 and 2 of the statute are valid, and were applicable to the facts in that case. This decision was approved in *Hopkins* v. *Swain*, 206 N. C., 439, 174 S. E., 409, in *Miller* v. *Short*, 206 N. C., 732, 175 S. E., 135, and in *Barringer* v. *Trust Co.*, 207 N. C., 505, 177 S. E., 795.

Speaking of sections 1 and 2 of the statute, it was said in *Woltz* v. *Deposit Co., supra:* "The statute does not violate any provision of the Constitution of the United States, or of the Constitution of the State of North Carolina, by which limitations are imposed upon the legislative power of the General Assembly of this State. It does not impair the obligation of the contract entered into by and between the parties to the mortgage or to the deed of trust; it does not deprive either party of property without due process of law; nor does it confer upon mortgagors or grantors in deeds of trust any exclusive privilege. The statute is remedial only, and is valid for the purpose. It

is applicable to a sale made since its enactment, although the sale was made under a power of sale contained in a mortgage or deed of trust executed prior to its enactment."

In the instant case, the validity of section 3 of the statute is challenged by the appellant on the ground that its enactment by the General Assembly of this State was in violation of section 10 of Article I of the Constitution of the United States, of the Fifth Amendment, and of section 1 of the Fourteenth Amendment of said Constitution, and was also in violation of sections 7, 17, and 35 of Article I of the Constitution of the State of North Carolina, in that said section impairs the obligation of the contract entered into by and between the plaintiff and the defendant prior to its enactment.

Section 3 of chapter 275, Public Laws of North Carolina, 1933, is as follows: "Sec. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee, or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: *Provided,* this section shall not affect nor apply to the rights of other purchasers or of innocent purchasers, nor shall it be held to affect or defeat the negotiability of any note, bond, or other obligation secured by such mortgage, deed of trust, or other instrument: *Provided, further,* this section shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judg-

ment sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed."

The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

We are of the opinion that the statute is valid, and so hold.

The statute involved in this action is not "emergency legislation," nor is it its purpose to provide a "moratorium" for debtors during a temporary period of depression. For this reason, the cases cited by appellant from other jurisdictions are not applicable in the instant case. The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust, but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides pro-

tection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. See *Better Plan Building & Loan Asso.* v. *Holden* (N. J.), 169 Atl. 289.

The statute is applicable in the instant case, and supports the judgment of the Superior Court. For that reason the judgment is

Affirmed.

Devin, J., took no part in the consideration or decision of this case.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK AND TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF APPELLANT.

JOHN Y. JORDAN, JR.,
Counsel for Appellant.

KESTER WALTON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
Appellant.

vs.

WACHOVIA BANK AND TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

BRIEF OF APPELLANT.

Reference to Report Below.

The opinion of the State Supreme Court (R. 35-41) is reported as "Richmond Mortgage and Loan Corporation v. Wachovia Bank & Trust Company and Alexandra G. Johnston, Executors of Robert P. Johnston, deceased," 210 N. C. (Advance Sheets), page 29. The same case is also reported in 185 S. E. Rep., 482.

No opinion was written in the General County Court of Buncombe County, where the case originated.

Statement of Jurisdiction.

In accordance with Rule XII, the appellant duly filed a statement showing the jurisdiction of this Court. Consideration of jurisdiction was postponed to the hearing of the case on the merits. Appellant submits here a summary statement of the jurisdiction of this Court, supplementing the statement heretofore filed.

The jurisdiction of this Court is invoked under Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 937; U. S. Code, Ann. Title 28, Section 344.

The judgment of the Supreme Court of North Carolina is a final judgment in a suit under Article 4, Sections 2 and 8 of the Constitution of the State of North Carolina, and Sections 615, 658, 659, 1412 and 1413 of the North Carolina Code. *Chavis* v. *Brown*, 174 N. C. 122.

The Statute or Act passed by the Legislature of the State of North Carolina, the validity of which is drawn in question and which, it is contended, is, as applied in this case, unconstitutional and repugnant to Article 1, Section 10 of the Constitution of the United States, is Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, pages 402 and 403 and also shown in the North Carolina Code of 1935, Ann., Section 2593 (d).

The judgment sought to be reviewed was entered in the Supreme Court of the State of North Carolina on the 29th day of April, 1936 (R. 41). The petition for appeal (R. 42), the assignment of errors (R. 42) and the prayer for reversal (R. 44) were presented to the Chief Justice of the Supreme Court of North Carolina on the 10th day of July, 1936, and the order allowing said appeal (R. 44) was issued and the appeal bond approved by him on the said 10th day of July, 1936. The citation on appeal was signed by him on the 10th day of July, 1936.

The case was brought by appellant, a Virginia corporation, to recover judgment in the amount of Four Thousand Five Hundred Thirty-four and 79/100 Dollars ($4,534.79) with interest from June 19, 1933, the balance due on promissory notes executed by defendants. At the time defendants executed said promissory notes, they also executed a Deed of Trust to a Trustee, pledging as security for the payment of said promissory notes certain property located in the County of Buncombe, State of North Carolina, the said notes and Deed of Trust were dated and delivered on or about August 15, 1928 (R. 11). Upon default in the payment of the indebtedness, appellant caused the property pledged as security for said indebtedness to be sold under power of sale contained in the Deed of Trust, which sale was held on June 19th, 1933 (R. 12).

After crediting the amount received from said sale on the notes, executed by respondents, there remained due the sum sued for in this action which was instituted on June 18th, 1934 (R. 1). The defendants in the action set up the provisions of Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, and the question was submitted to a jury as to the fair worth of the property at the time and place of the sale, and the jury answered the verdict in the amount of Eight Thousand Dollars ($8,000.00) (R. 21), and on such verdict the court adjudged that plaintiff was entitled to recover nothing of the defendants (R. 28). It was admitted at the trial that the property was purchased directly or indirectly at the foreclosure sale by the appellant who was then the owner of the indebtedness (R. 14). Plaintiff in said action, the appellant herein, filed pleadings in said cause alleging that Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, was repugnant to the provisions of Article I, Section 10 of the Constitution of the United States as applied to this appellant, because the notes sued on, together with the Deed of Trust

securing the same, were executed prior to the passage of said Act (R. 8). The appellant, during the entire trial of said action, and at each stage of the proceedings, preserved its exceptions as to the unconstitutionality of the Act in question and as applied in this case.

To sustain the jurisdiction of this Court, appellant contends:

First. The judgment appealed from is a final judgment of the Supreme Court of North Carolina, which is the highest court in the State having jurisdiction of the case. The case drew in question the validity, under the Federal Constitution, of the Statute of North Carolina providing for the right of a mortgagee to prove in a suit for a deficiency judgment the fair or reasonable value of said property as a defense and offset and thereby defeat the recover of such deficiency judgment against the maker of the notes, and mortgagee, either in whole or in part, and such statute was applied in this case although appellant's notes and Deed of Trust were executed prior to the passage of said Act, and the judgment of the State Court upheld the validity and application of the statute.

Second. That the Act in question impairs the obligation of a contract entered into prior to the time of its passage, and as construed in the instant case, is repugnant to the Federal Constitution.

Third. The Supreme Court of the State of North Carolina considered the question as to whether or not the statute was unconstitutional as applied to this appellant in the instant case.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Fiske v. *Kansas,* 274 U. S. 380, 385;

Dahnke-Walker Milling Co. v. *Bondurant,* 257 U. S. 282, 288;

Kansas City Southern Railway Co. v. *Road Improvement District,* 266 U. S. 379, 385;
Cohens v. *Virginia,* 6 Wheat. 264, 5 L. Ed. 257;
Home Building and Loan Association v. *Blaisdell,* 290 U. S. 398.

Statement of Case.

This is an appeal from a final judgment of the Supreme Court of the State of North Carolina, affirming the judgment of the Superior Court for Buncombe County, which court affirmed a judgment of the General County Court of Buncombe County, entered after a trial before the court and a jury.

On or about August 15, 1928, the respondents borrowed from the appellant the sum of Eight Thousand Dollars ($8,000.00), and as evidence of said indebtedness executed their promissory negotiable notes in the aggregate amount of Eight Thousand Dollars ($8,000.00) (R. 11). As security for said indebtedness, respondents also at the same time executed and delivered a Deed of Trust by the terms of which respondents pledged as security for said indebtedness a house and lot located in the City of Asheville, State of North Carolina (R. 11).

Thereafter, respondents defaulted in the payment of the indebtedness evidenced by said notes and secured by said Deed of Trust and appellant called on the Trustee in said Deed of Trust to foreclose the said property in accordance with the power of sale contained in said Deed of Trust, declaring the whole of said indebtedness due and payable in accordance with the terms of said notes and Deed of Trust (R. 12).

The said Trustee advertised said property in accordance with the terms of the Deed of Trust and the statutory law of the State of North Carolina and the property was sold on the 19th day of June, 1933 where and when the said

appellant directly or indirectly became the purchaser of said property for the price of Three Thousand Dollars ($3,000.00); and after the ten day period of redemption, the property was conveyed in accordance with the terms of the sale. (R. 12).

The net sum realized from the sale of said property was credited on the notes held by appellant and leaving a balance due appellant in the sum of Four Thousand Five Hundred Thirty-four and 79/100 Dollars ($4,534.79), together with interest thereon from the 19th day of June, 1933, until paid. (R. 13-21.)

Appellant, on June 18th, 1934, filed suit in the General County Court of Buncombe County (R. 1), to recover balance due on the notes.

The respondents (defendants below), in their pleadings, alleged, in substance, the provisions of Section 3, Chapter 275, Public Laws of North Carolina, Session 1933 (Statute is printed in margin),[1] and alleged that the property at the time and place of sale was fairly worth the amount of the debt secured by said Deed of Trust (R. 7, para-

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[1] Sec. 3 of Chap. 275, of the Laws of 1933:

"When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim,

graph 4 of Answer of defendants). The appellant (plaintiff below), in reply, alleged that said Act, to-wit: Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, was unconstitutional and repugnant to the provisions of Article I, Section 10, of the Constitution of the United States because the notes sued on, together with the Deed of Trust securing the same, were executed prior to the passage of said Act (R. 8).

At the trial of the cause in the General County Court issues were submitted to the jury relative to the appellant becoming the purchaser of the property and the fair worth of the property at the time and place of sale, to which issues appellant objected and excepted (R. 21). Appellant also objected and excepted to the charge of the court on the question of the fair value of the property, and objected and excepted to the refusal of the Court to render judgment in favor of the appellant on the pleadings, and to the signing of the judgment as entered in the General County Court (R. 28-29). Appeal was taken from the General County Court of Buncombe County to the Superior Court of Buncombe County, the proper appeal court, and in the

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that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part; *Provided,* this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust, or other instrument; *Provided, further,* this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

Superior Court of Buncombe County, the assignments of errors from the General County Court were overruled and the judgment affirmed (R. 31), from which judgment of the Superior Court of Buncombe County appeal was taken to the Supreme Court of North Carolina, which court affirmed the judgment of the General County Court (R. 41).

There is no technical question of procedure. The sole question is whether the Act in question impaired the obligation of a contract entered into by and between appellant and respondents prior to the passage of said Act, and was, therefore, in violation of the Federal Constitution.

Specification of Errors.

1. The Supreme Court of the State of North Carolina erred in refusing to find Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, unconstitutional and repugnant to Article 1, Section 10, of the Constitution of the United States because, as construed and applied to this appellant, it results in impairing the obligation of a contract entered into by the respondents and which said contract is owned by the appellant and which said contract was entered into and executed prior to the passage of said above referred to Act.

2. The Supreme Court of North Carolina erred in holding Section 3, Chapter 275, of the Public Laws of North Carolina, Session 1933, applicable in the above cause because, as construed and applied to this appellant, it resulted in depriving appellant of a judgment against the respondents to which it was entitled in accordance with the laws of the State of North Carolina at the time the contract which is the subject matter of the action was entered into.

3. The Supreme Court of North Carolina erred in affirming the judgment of the Superior Court and in refusing to reverse said judgment upon the ground that the said Su-

perior Court erred in affirming the judgment of the General County Court denying to the appellant the right to have judgment rendered in its favor and on the pleadings as filed in said cause and at the close of all the evidence.

4. The Supreme Court of the State of North Carolina erred in rendering a final judgment or decree against the appellant upon the 29th day of April, 1936 in the above entitled cause.

Summary of Argument.

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I. The parties to the contract in question contracted with reference to the laws at that time in existence and such laws enter into and form part of the contract. This is true of the laws then in existence providing remedies to enforce performance of the contract 12

Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398;

United States ex Rel. Louis A. Von Hoffman v. *City of Quincy*, 4 Wall. 535, 18 L. Ed. 403;

Sturges v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529;

Green v. *Biddle*, 8 Wheat. 1, 5 L. Ed. 547;

Bateman v. *Sterrett*, 201 N. C. 59;

Green v. *Asheville*, 199 N. C. 516;

Trust Company v. *Hudson*, 200 N. C. 688.

II. Under the law as it existed in North Carolina at the time the contract was entered into, beneficiary in a deed of trust had the right to foreclose by power of sale the property pledged as security, buy it in at the highest bid, credit the amount of the purchase price and recover a

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money judgment against makers for balance due without reference to value of the property foreclosed 13

Revised Statutes of North Carolina, Chapter XXXVII, Section 24, page 231;
Kornegay v. *Spicer*, 76 N. C. 95;
Shew v. *Kall*, 119 N. C. 450;
Flemming v. *Borden*, 127 N. C. 214;
Eubanks v. *Bectom*, 158 N. C. 230;
Hayes v. *Pace*, 162 N. C. 288;
Monroe v. *Fuchtler*, 121 N. C. 101;
Wilson v. *Vreeland*, 176 N. C. 504;
Phipps v. *Wyatt*, 199 N. C. 727;
First Carolina's Joint-Stock Land Bank v. *Stewart et al.*, 208 N. C. 139;
Insurance Company v. *Dey*, 206 N. C. 368;
Bank v. *Loughran*, 122 N. C. 668;
Rector v. *Lyda*, 180 N. C. 577;
Baber v. *Hanie*, 163 N. C. 588;
Dunlop v. *Smith et al.*, 196 N. C. 502.

III. The Act in question, passed after the execution of the contract, changed the law of North Carolina whereby the beneficiary in a deed of trust and after foreclosure under power of sale is required to accept the fair value of the property as payment on the indebtedness in lieu of recovery of money judgment 16

Re Crystal Ice and Fuel Company (D. C. Mont.), 283 Fed. 1007;
Richmond Mortgage and Loan Corporation v. *Bank*, 210 N. C. 29;
Jones v. *Williams*, 155 N. C. 179;
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Woltz v. *Deposit Company*, 206 N. C. 239;
Chadbourn v. *Johnston*, 119 N. C. 282;
Davis v. *Life Insurance Company*, 197 N. C. 617;
Chapter 275, *Public Laws of North Carolina, Session* 1933, *North Carolina Code*, *Section* 2593 (b), (c), (d), (e) and (f);
Haywood v. *Bank*, 207 N. C. 695.

IV. The passage of the law in question, while acting only on the remedy, impaired substantial contractual rights held by appellant under its contract, and therefore is unconstitutional as applied in this case 22

Sturges v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529;
McCracken v. *Hayward*, 2 Howard 608, 11 L. Ed. 397;
Home Building and Loan Association v. *Blaisdell*, 290 U. S. 398;
Planters Bank v. *Sharp*, 6 Howard 301, 12 L. Ed. 447;
Haywood v. *Bank*, 207 N. C. 695;
W. B. Worthen Company v. *Kavanaugh*, 295 U. S. 56;
Antoni v. *Greenhow*, 107 U. S. 769, 27 L. Ed. 468;
Bronson v. *Kinzie*, 1 Howard 311, 11 L. Ed. 143;
Howard v. *Bugbee*, 24 Howard 461, 16 L. Ed. 753;
Walker v. *Whitehead*, 16 Wall. 314, 21 L. Ed. 357;

Edwards v. *Kearzey*, 96 U. S. 595, 24 L. Ed. 793;

Barnitz v. *Beverly*, 163 U. S. 118, 41 L. Ed. 93;

Adams v. *Spillyards*, 86 A. L. R. 1493, 61 S. W. (2nd) 686;

Vanderbilt v. *Bruton Piano Company*, 89 A. L. R. 1080, 169 Atl. 177;

Langever v. *Miller*, 96 A. L. R. 836, 76 S. W. (2nd) 1025.

ARGUMENT.

Point I.

The parties to the contract in question contracted with reference to the laws at that time in existence and such laws enter into and form part of the contract. This is true of the laws then in existence providing remedies to enforce performance of the contract.

The above set forth principle of law is so firmly established in this Court that argument is unnecessary. Quoting from *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, at page 430:

> "The laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

United States ex Rel. Louis A. Von Hoffman v. *City of Quincy*, 4 Wall, 535, 18 L. Ed. 403, 408;

Sturges v. *Crowninshield*, 4 Wheat, 122, 4 L. Ed. 529, 549;

Green v. *Biddle*, 8 Wheat. 1, 5 L. Ed. 547.

This is also true with regard to contracts and as construed by the Supreme Court of North Carolina. We quote from *Bateman* v. *Sterrett,* 201 N. C., 59, 61:

> "But it is also true that the laws in force at the time of the execution of a contract enter into and become a part of the convention of the parties."
>
> *Green* v. *Asheville,* 199 N. C. 516, 520;
>
> *Trust Company* v. *Hudson,* 200 N. C. 688, 690.

Point II.

Under the law as it existed in North Carolina at the time the contract was entered into, beneficiary in a deed of trust had the right to foreclose by power of sale the property pledged as security, buy it in at the highest bid, credit the amount of the purchase price and recover a money judgment against makers for balance due without reference to value of the property foreclosed.

Deeds of Trust and mortgages with power of sale originated in the State of North Carolina from the common law. We first find that the Deed of Trust, also the mortgage, was protected by the registration laws of the State of North Carolina and as shown in the Revised Statutes of North Carolina, Chapter XXXVII, Section 24, page 231, and which revised statutes went into effect on January 1st, 1838. The first discussion we find of foreclosure by power of sale is in the case of *Kornegay* v. *Spicer,* 76 N. C. 95. Quoting from this case, page 97:

> "A mortgage with a power of sale is a trust(ee), in the first place, to secure the payment of the debt secured by the mortgage, and, in the second place, for the mortgagor, as to the excess. The idea of allowing the mortgagee to foreclose the equity of redemption by a sale made by himself, instead of a decree for foreclosure and a sale made under the order of the court, was yielded to, after great hesitation, on the ground

> that, in a plain case, when the mortgage debt was agreed on and nothing was to be done except to sell the land, it would be a useless expense to force the parties to come into equity when there were no equities to be adjusted, and the mortgagor might be reasonably assumed to have agreed to let a sale be made after he should be in default."

Since the last above decision, such powers of sale have been recognized in the following cases:

Shew v. *Kall,* 119 N. C. 450, 453;
Flemming v. *Borden,* 127 N. C. 214, 217;
Eubanks v. *Bectom,* 158 N. C. 230.

Also, from time to time, and since the Revised Statutes of North Carolina, *supra,* went into effect, various statutory laws have been passed by our Legislature regulating and controlling the foreclosure of Deeds of Trust under powers of sale.

It is also the established law in the State of North Carolina that the beneficiary in a Deed of Trust made to a trustee and for the purpose of securing an indebtedness has the right to bid in the property at a sale held by such trustee. We quote from *Hayes* v. *Pace,* 162 N. C. 288, 292:

> "We do not controvert the proposition, supported by abundant authority, that the owner of a debt secured in a deed in trust made to a third party as trustee with power of sale, may lawfully bid and purchase at the sale, where there is no allegation or evidence of fraud or collusion between the creditor and the trustee."
>
> *Monroe* v. *Fuchtler,* 121 N. C. 101;
> *Wilson* v. *Vreeland,* 176 N. C. 504;
> *Phipps* v. *Wyatt,* 199 N. C. 727.

It has also been a well-established principle of law in the State of North Carolina, that, after foreclosure under power of sale in a Deed of Trust or mortgage, the holder

of the Deed of Trust or notes representing the indebtedness might recover a money judgment against the maker of the notes and Deed of Trust by suit in law and for the balance unpaid, after giving credit for the price for which the property was sold at such foreclosure sale.

In a late case, that of *First Carolina's Joint-Stock Land Bank* v. *Stewart et al.*, 208 N. C. 139 (1935), the Supreme Court of North Carolina held, in a cause of action almost identical to that alleged in the instant case, that defenses interposed by the defendants were immaterial and irrelevant and should be stricken out and upheld a judgment for deficiency after sale in a Deed of Trust. Quoting from this case, page 140:

> "It would seem from the allegations in their answer that the defendants were dealt with harshly by the plaintiff, but the court is without power to give them relief in this action. The plaintiff does not in this action invoke the equitable powers of the court. It is content to have only its legal remedy."

Of course, had the plaintiff gone into a court of equity asking for foreclosure of the property under a strict foreclosure it would have been subject to equitable defenses. Also, in the case of *Insurance Company* v. *Dey*, 206 N. C. 368, a cause of action almost identical to that alleged in the instant case was upheld and a demurrer filed to such action was overruled.

Quoting from *Bank* v. *Loughran*, 122 N. C. 668, 674:

> "And Bostick occupies the position of mortgagee of these lands as security for the payment of six notes, with a power to sell from the defendant; the notes not being paid, and Bostick as mortgagee selling under the power and applying the money on the debt as directed in the power; the money arising from the sale not being sufficient to pay the debt secured; can it be contended that the mortgagor, the defendant in this case, would not be liable to a personal judgment

for the balance of the debt? We can see no reason why he is not. So while this case upon the facts stated seems to be new, it is susceptible of solution upon well-established principles of law."

Quoting from *Rector* v. *Lyda*, 180 N. C. 577, 578:

"The doctrine of equity is that when the grantee in a deed assumes the payment of the mortgage debt he is to be regarded as the principal debtor, and the mortgagor occupies the position of a surety; and the mortgagee is permitted to resort to the grantee to recover the deficiency after applying the proceeds of a sale of the mortgaged premises, and this by the equitable rule that the creditor is entitled to the benefit of all the collateral securities which his debtor has obtained to reinforce the principal obligation."

Baber v. *Hanie*, 163 N. C. 588;
Dunlop v. *Smith et al.*, 196 N. C. 502.

While we have no cases in North Carolina passing on the point, an investigation fails to show where, by any principle of law or decision in the State of North Carolina, prior to the passage of the Act in question, it could be urged that the fair value of the property foreclosed under a power of sale in a Deed of Trust could be pled and proven as an offset to defeat the rights of the mortgagee or beneficiary in a Deed of Trust to recover in an action for deficiency judgment.

POINT III.

The Act in question, passed after the execution of the contract, changed the law of North Carolina whereby the beneficiary in a deed of trust and after foreclosure under power of sale is required to accept the fair value of the property as payment on the indebtedness in lieu of recovery of money judgment.

In Point II, we discussed and showed the rights of a beneficiary in a Deed of Trust, prior to the passage of the Act in question. We will now discuss the rights and reme-

dies left to a beneficiary in a Deed of Trust after the passage of the Act, the validity of which is drawn in question.

Attention is called to the wording of the statute in question, and as follows:

> "It shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount paid was substantially less than its true value and upon such showing, to defeat or offset any deficienty judgment against him, either in whole or in part."

It will be noted that the words "fair worth" and "true value" are used. It is noted that the words "market value" or "salable value" are not used. The question then arises, what is "fair worth" or "true value"? We submit that it was the purpose of the Legislature in the passage of this law to attempt to give to the mortgagors credit for the value of the property, taking into consideration what it should be worth under ordinary circumstances where you have a person willing to sell and a purchaser willing to buy. In other words, it was the direct purpose of the passage of this Act, as gathered from the terms of it, to prevent the makers of mortgages from being held responsible for the depreciated value of the property, and which came about from the depressed market for real estate all over the country and particularly at the location of this property since the year 1930.

This was not the intention of the parties, or the contract of the parties, at the time it was entered into in the year 1928. Under the terms of the contract, the makers of the obligation agreed that if they defaulted in the payment, the property could be put up and sold after thirty days' notice, under the statutory law of the State of North Caro-

lina, to the highest bidder and, if necessary, that such highest bidder be the beneficiary in the Deed of Trust, and that thereafter they would be personally liable for any balance due. The Legislature came to their assistance by virtue of the terms of this Act and changed that agreement by saying, irrespective of what anyone is willing to pay for the property at such foreclosure sale, you will be entitled to receive credit for what the property should be worth under normal circumstances, and this without regard to the economic conditions prevailing at the time of the sale.

As was stated *in re Crystal Ice and Fuel Company* (D. C. Mont.), 283 Fed. 1007, 1009:

> "Salable value and fair valuation are not synonymous."

In other words, the direct result of the passage of the Act in question and the force and effect of the judgment rendered in this cause was that the appellant was forced to accept a valuation of the property, not what it could be sold for at that date, in lieu of money as payment of the indebtedness which it held.

But the point is raised in the opinion of the Supreme Court of North Carolina, 210 N. C. 29, page 34:

> "Nor does the statute hinder, delay or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction."

It will, therefore, be necessary to discuss what the rights of the beneficiary in the Deed of Trust would be in a "court of competent jurisdiction."

It has always been held, under the common law of the State of North Carolina, that an equity court had jurisdiction over the foreclosure of indebtednesses secured by

mortgages or Deeds of Trust. However, in such court of equity, the Court is not bound by the terms of the contract existing between the parties, particularly with reference to the foreclosure and the procedure looking to that end. Quoting from *Jones* v. *Williams*, 155 N. C. 179, page 191:

> "Its (the Court's) power to foreclose is not derived from the power of sale in the mortgage. It could decree foreclosure if the instrument contained no such power. The court acts under its general equity jurisdiction and proceeds to grant relief irrespective of the stipulations contained in the power of sale. It pursues its own course and practice without any restraint by reason of the power of sale contained in the Deed, so as to administer the rights of the parties according to law and its own equitable procedure, acting under its own powers and jurisdiction and not by virtue of any contractual power given in the mortgage or deed of trust."

Quoting from *Koonce* v. *Fort*, 204 N. C. 426, 430:

> "There is nothing in the statute which deprives the court of its power to prescribe the terms upon which land or other property shall be sold under its orders, judgments or decrees."

Quoting from *Woltz* v. *Deposit Company*, 206 N. C. 239, 241:

> "When a sale has been made under a judgment or decree of a court of competent jurisdiction, the sale must ordinarily be reported to and confirmed by the court, before it can be consummated by a conveyance of the property. In that case, the sale will not be confirmed, and a conveyance of the property ordered, unless it is made to appear to the court that the sale was fairly conducted, and the amount bid for the property its reasonable value."

It will be seen from the above referred to leading cases on this subject that the foreclosure of a Deed of Trust in

an Equity Court is an entirely different procedure from that of the foreclosure by a trustee under the power of sale. It is an equitable proceedings and subject to all equitable defenses. It hinders and delays the beneficiary from the prompt compliance under the terms of the Deed of Trust. The sale may be made upon any conditions that the court sees fit to prescribe. The confirmation of the sale as to price is within the equitable discretion of the court. Also, the granting of the recovery for any balance due is within the equitable discretion of the court. The contract entered into by and between the parties is not interpreted as written, but is interpreted according to equitable principles. While we do not condemn the use of these equitable powers, or for one minute question the wisdom of their protection to mortgagors, at the same time the parties entered into a contract where, by the laws as they then existed, the beneficiary had the right to enforce its contract without subjecting itself to this course of procedure.

It is also true that in strict foreclosure in a Court of Equity in the State of North Carolina it is necessary to bring in all junior lienors, devisees of a deceased mortgagor and any other persons claiming any interest in the title to the property involved in order to secure a clear title from the Court. *Chadbourn* v. *Johnston,* 119 N. C. 282; *Davis* v. *Life Insurance Company,* 197 N. C. 617.

The respondents contend that appellant has been deprived of no remedy because, while it is true that prior to the Act of 1933, appellant could have foreclosed under the power of sale and obtained a deficiency judgment, yet the respondents always had the right to go into a Court of Equity, secure a restraining order and have the property foreclosed under the direction and decree of an Equity Court and accordingly appellant has not been damaged by the Act of 1933.

But, appellant was deprived of a remedy by the Act of 1933, because, under that Act it could have sold under the power of sale and obtained a deficiency judgment, and as the only complaint respondents make is that the property did not bring a fair price, they could have only enjoined the sale and thrown the foreclosure into an Equity Court on that ground, and on that ground an Equity Court would not have taken jurisdiction.

This point has been directly decided by the Supreme Court of North Carolina in a late case, that of *Haywood* v. *Bank* (1935), 207 N. C. 695. In this action, plaintiffs secured an equitable restraining order restraining the foreclosure of a deed of trust. Among the grounds alleged was that the deed of trust was foreclosed at such time as the property would not bring its full and fair market value, and was therefore detrimental to all interested parties. The Court, in speaking of this allegation, said the following:

> "There is left only the allegation that if the deed of trust was foreclosed at this time the property would not bring its full and fair market value, and neither the legislation growing out of present financial emergency nor the decisions of this Court authorize or sustain injunctive relief for the reason that the time is not auspicious for a sale. To so hold would practically nullify the system of securing indebtedness by mortgages and deeds of trust on land now, and for many years past, in general and accepted use.
>
> "It appears from the record that the note secured by the deed of trust is past due and unpaid, that those who hold the equity of redemption have ratified and confirmed the execution of the said note and deed of trust, and that demand for payment has been made, and that there is no allegation of fraud, restraint, oppression, or usury in the transaction, or of insolvency of the *cestui que trust* or trustee.

"We are constrained to hold, on the record, that the restraining order should be dissolved, and it is so ordered.

From the above we think it clearly established by the law of North Carolina that an equity court, in so far as restraining the sale of property under a power of sale by the trustee, has no authority to grant any relief on the ground of fair value of the property, or the price bid at said sale. Therefore, appellant contends that, prior to the passage of the Act of 1933, it had a substantial contract right to proceed by power of sale and deficiency without any interference of a Court of Equity on the only grounds contended for by the respondents in this cause.

POINT IV.

The passage of the law in question, while acting only on the remedy, impaired substantial contractual rights held by appellant under its contract, and therefore is unconstitutional as applied in this case.

We do not think that it can be contended that there was not a change or alteration in the remedy whereby the contract in question might be enforced. No doubt, however, it will be contended that the change of remedy was such change and alteration as was within the right of the State Legislature to control.

The appellant insists, however, that the obligations of its contract were impaired in that the impairment was predicated on a law which annulled, abolished and abrogated a very substantial contractual right which it held under the contract. This substantial right was to sue for deficiency, after foreclosure by power of sale, without accounting for the "fair worth" of the property so foreclosed.

The change in the remedy produced by the passage of the Act released a part of the obligation which bound the

makers of the deed of trust and note. Quoting from *Sturges* v. *Crowinshield*, 4 Wheat. 122, 4 L. Ed. 529, 549:

> "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation, must, in the literal sense of the word, impair it."

The passage of the Act in question diminished the duty which the obligors owed under the contract, and furthermore obstructed the rights accruing to the obligee. Quoting from *McCracken* v. *Hayward*, 2 Howard 608, 11 L. Ed., 397, 399:

> "There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated, the law defines the duty and right, compels one party to perform the thing contracted for, and gives the other the right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

It is not thought necessary to cite or quote all the cases decided by this Court touching upon this all-important question of what impairs the obligation of a contract, but we believe the gist of these decisions may be well summed

up in the few words contained in *Home Building and Loan Association* v. *Blaisdell*, 290 U. S. 398, 431:

> "The obligations of a contract are impaired by law which renders them invalid or releases or extinguishes them—and, impairment, as above noted, has been predicated of laws which, without destroying contracts, derogate from substantial contractual rights."

As was stated in *Planters Bank* v. *Sharp*, 6 Howard 301, 327, 12 L. Ed. 447, 458:

> "One of the tests that a contract has been impaired is, that its value has by legislation been decreased. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

The appellant is willing to test the impairment of its contract by the passage of the law in question by the above rule, and let us consider the value of this contract before and after the passage of the Act. Before the passage of the Act, the holder of the notes and a deed of trust had the right to demand payment upon default and to have the property immediately advertised for foreclosure by the trustee, and at the sale of said property to bid it in at the highest bid, take the property for whatever it might bring at the sale and thereafter sue for and recover a money judgment for the balance due. This completed one of the means of enforcement. It was expeditious, complete and economical. There were no means, prior to the Act of 1933, by which the carrying out of this procedure could be delayed or hindered by the maker of a note and obligor on the grounds that the property would not bring its fair value, because a Court of Equity, upon application for a restraining order to prevent the sale or to prevent confirmation of the sale,

would not take jurisdiction on this ground. *Haywood* v. *Bank*, 207 N. C. 695.

What were the rights of the appellant after the passage of the Act? It could still foreclose under the power of sale, bid in the property and either stop there or proceed to recover a deficiency judgment. However, it was then met with a jury verdict as to the fair value of the property, and whatever amount might be adjudicated as a fair value must be credited on the notes instead of payment in money. If appellant did not elect to take its chances as to what the property would bring at the sale under the power and as to what a jury verdict might be as to the amount it would credit on the notes as fair value of the property, it could then go into a Court of Equity and ask for foreclosure under the equitable powers of the Court. In this proceedings, the terms of the contract with regard to the sale of the property, the terms of the sale, the time of the sale, the reasonableness of the bid made for the property, which would in turn mean the reasonableness of the amount which it would collect as deficiency would all be within the equitable discretion of the Court. It would also be forced to bring in all parties who might have an interest in the land sought to be foreclosed. To complete its possession of the property under such procedure, was fraught with various obstacles, delay, hindrances and what influence the economic conditions might have in the conscience of the Court.

Let us assume further that from the years 1928 to 1934 there had been a great depreciation in property values, and, as illustrated by the record in this case, property on which Eight Thousand Dollars ($8000.00) was loaned in 1928 was sold in 1933 after due advertisement at public sale, and the last and highest bid thereon was Three Thousand Dollars ($3000.00), and that, therefore, it was apparent that the property did not have a salable value comparable to the

amount of indebtedness at the time of default. Would any investor, business man or other person consider a contract as valuable after the passage of the Act in question as he would have considered it prior thereto? In reality, after the passage of the Act, any purchaser of the contract would be buying a lawsuit with very little chance of complete recovery and he would have every reason to believe that he was going to take a loss on the face value of such contract. We believe a statement contained in *W. B. Worthen Company* v. *Kavanagh*, 295 U. S. 56, 62, quoted as follows:

> "What controls our judgment at such times is the underlying reality rather than the form or label. The changes of remedy now challenged as invalid are to be viewed in combination, with the cumulative significance that each imparts to all. So viewed, they are seen to be an oppressive and unnecessary destruction of nearly all the incidents that give attractiveness and value to collateral security."

is very pertinent to the instant case.

Let us view the matter from the standpoint of the obligors in said contract. Under the law as it existed at the time of the execution of this contract, the obligors were spurred by every motive of self-interest to pay their obligation, otherwise they knew the property might be foreclosed promptly and they would be liable for the difference between what the property brought at public sale and the amount of the debt. They also knew that they could not prevent such action on the sole ground that the property would not bring its fair value at the time of such sale. (207 N. C. 695.) Therefore, it behooved them to make every effort to keep the obligation in good standing and to prevent such foreclosure. After the passage of the Act, the obligors felt secure in permitting a default to occur. If sued for a money judgment without foreclosing the

property, they had the benefit of the security until such time as it might be fairly worth the indebtedness against it. If sued in a Court of Equity for foreclosure under the powers of the Court, they knew that they could delay any positive action for an indeterminable period and contest over the reasonable value of the property; that further, if the beneficiary foreclosed by power of sale, they would be in still better circumstances by getting credit, not for what the property would sell for at such foreclosure sale but what it was fairly worth.

Was not the position of the obligors, the respondents in this case, greatly changed, all to their advantage, and was not this the real intention of the Legislature in the passage of this Act? If they did obtain an advantage under the contract by the passage of the law in question and to the derogation of a substantial right of the appellant, then can it be said that the contract was not devalued, its efficacy lessened and its force depleted?

It has been said throughout the various lines of authority bearing on this subject that every case must be determined upon its own circumstances. Quoting from *Antoni v. Greenhow,* 107 U. S. 769, 775; 27 L. Ed. 468, 471:

> "It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the Act is within the prohibition of the Constitution and, to that extent, void."

Taking into consideration the points discussed heretofore as to the rights of the appellant prior to the passage

of the Act in question, and the rights left to him after the passage of the Act, it is contended that this case falls within that class of cases heretofore decided by this Court as being within the prohibition, a few of which are referred to as follows:

In *Bronson* v. *Kinzie*, 1 Howard, 311, 316, 11 L. Ed. 143, 145, a mortgage was executed in Illinois containing a power of sale. Subsequently an Act of the Legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing the pre-existing remedies, impaired the obligation of a contract and was, therefore, void.

In *McCracken* v. *Hayward*, 2 Howard 608, 11 L. Ed. 397, 399, a statutory provision that personal property should not be sold under execution for less than two-thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void for the reason that it impaired the obligation of the contract.

In *Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. Ed. 529, 549, it was held that a State insolvent or bankrupt law was inoperative as to contracts which existed prior to its passage.

In *Howard* v. *Bugbee*, 24 Howard 461, 16 L. Ed. 753, it was held that an act passed by a State after the execution of a mortgage was inoperative and void as impairing the obligation of a contract where it was attempted to give an extension of two years after the sale under the mortgage in which the mortgagor might redeem the land.

In *Walker* v. *Whitehead*, 16 Wall. 314, 21 L. Ed. 357, this Court held unconstitutional a Georgia statute requiring the plaintiff, suing on a contract, to prove as a condition precedent to recovery in his favor that all legal taxes

chargeable by law thereon had been paid since the making of the contract, and that such act was an impairment of the obligation of a contract.

In *Edwards* v. *Kearzey,* 96 U. S. 595, 24 L. Ed. 793, 796, this Court held that an act of the State of North Carolina increasing the exemption to which a debtor was entitled was unconstitutional and invalid as applied to a pre-existing debt. Quoting from this decision:

> "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those 'imperfect obligations', as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable."

In *Barnitz* v. *Beverly,* 163 U. S. 118, 127, 41 L. Ed. 93, 100, this Court held a law of Kansas invalid as applied to a sale under a mortgage executed before its passage whereby the period of redemption from sale under a mortgage was extended for a period of eighteen months. Quoting from this case:

> "At all events the decisions of this Court are numerous that the laws which prescribe the mode of enforcing a contract, which are in existence when it is made, are so far a part of the contract that no changes in these laws which seriously interfere with that enforcement are valid, because they impair its obligation within the meaning of the Constitution of the United States."

In *W. B. Worthen Company* v. *Kavanaugh,* 295 U. S. 56, this Court held that a law of the State of Arkansas extending the time for various steps in a proceeding to enforce

payment of an assessment and other restrictions, was invalid and unconstitutional as impairing the obligation of a contract theretofore entered into.

The case of *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398, may be distinguished in that this case was decided on the grounds of an emergency, but in that case we quote the following, page 445:

> "As already noted, the integrity of the mortgage indebtedness is not impaired; interest continues to run; the validity of the sale and the right of a mortgagee purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained."

It has been found that in at least seventeen States various laws have been passed within the past few years attempting to limit, regulate or cut off rights of the mortgagees to deficiency judgments. Several of these cases have been ruled on by their respective Supreme Courts. In the case of *Adams* v. *Spillyards,* 86 A. L. R. 1493, 61 S. W. (2nd) 686, the Supreme Court of the State of Arkansas held that such act was unconstitutional, and quoting from that case, page 1497:

> "This, too, in the face of the fact that the loan was made more on the moral risk than on the real estate security in the one case, and more on the personalty securing the loan than the real estate in the other. The undisputed effect of Sections 1 and 2 of the Act is to prohibit deficiency judgments in mortgage foreclosures in Chancery Courts, a legal possible right inherent in all existing Arkansas mortgages at the effective date of the Act, which was a part of the mortgage contracts themselves. This personal liability was a part of the contract because authorized by law at the time of execution and in the place of performance. The principal

object of Act No. 57 was to take away from the mortgagee that right, and of necessity violates the obligations of all existing mortgage contracts."

Also in the case of *Vanderbilt* v. *Bruton Piano Company*, 89 A. L. R. 1080, 169 Atl. 177, the Supreme Court of New Jersey ruled on a similar Act and quoting from this case, page 1084:

"The statutory setting up of fair market value, standing stark and alone, as a self-sufficient, resistless fact in reduction of an otherwise collectible debt is such a restriction and limitation upon the mortgagee's right of recovery as to be an impairment of a pre-existing contract, and therefore, and to that extent, in conflict with Article 1, Section 10, of the Constitution of the United States."

In the case of *Langever* v. *Miller*, 96 A. L. R. 836, 76 S. W. (2nd) 1025, the Supreme Court of the State of Texas held that an Act similar and almost identical to that in the instant case was unconstitutional.

It is to be borne in mind that the Act in question, which is Section 3, Chapter 275, Public Laws of North Carolina, Session 1933, is not predicated upon any emergency, or is not concerned with any relief to a debtor during the depression. It is not temporary in its nature, it is final, complete and permanent. It is not restrictive to properties occupied by the mortgagor. The law is equally applicable to properties both for speculative purposes, for investment or otherwise.

Appellant respectfully submits that within the strength of the decisions of this Court, as set forth in the following passage, it is entitled to have its contract upheld without the interference of the passage of the Act of 1933. Quoting

from *Edwards* v. *Kearzey*, 96 U. S. 595, 611, 24 L. Ed. 793, 797:

> " 'Policy and humanity' are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification, and we have no judicial authority to interpolate any. Our duty is simply to execute it."

POINT V.

The judgment should be reversed.

Respectfully submitted,

JOHN Y. JORDAN, JR.,
Counsel for Appellant.

KESTER WALTON,
Of Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
Appellant,

vs.

WACHOVIA BANK & TRUST COMPANY AND ALEXANDRA GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, DECEASED.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

R. R. WILLIAMS,
S. G. BERNARD,
Counsel for Appellant.

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Appellees.

STATEMENT OF MATTERS MAKING AGAINST THE JURISDICTION OF THE COURT.

The appellees respectfully present the following matters and grounds making against the jurisdiction of the Court to entertain this appeal:

1.

It is respectfully submitted that no substantial Federal question arises upon this appeal for that the statute enacted by the Legislature of the State of North Carolina at its legislative session of 1933, being Section 3 of Chapter 275 of the Public Laws of North Carolina for the Year 1933, at pages 402 and 403, is as follows:

> "SEC. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or

other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part; *Provided*, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust, or other instrument: *provided, further*, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

2.

By the express provisions of the foregoing statute the ancient right of the holder of an indebtedness, the payment of which is secured by deed of trust or mortgage, to institute foreclosure proceedings in the courts, is preserved to appellant and all others similarly situated and, therefore, no Federal question is presented.

3.

It becomes immediately apparent that the statute complained of deals solely and entirely with the remedy or

procedure to which the holder of a debt secured by mortgage may resort for the enforcement of collection.

There is no vested right in any given mode of procedure and so long as a substantial and efficient remedy remains or is provided due process of law is not denied by a legislative change.

Crane v. *Hahlo*, 258 U. S. 142, 147.

It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away.

Waggoner v. *Flack*, 188 U. S. 595, 602;
Oshkosh Water Works Co. v. *Oshkosh*, 187 U. S. 437;
National Surety Co. v. *Architectural Decorating Co.*, 226 U. S. 276.

For the reasons stated herein, appellees move that this appeal be dismissed.

Respectfully submitted,

R. R. Williams,
Counsel for Appellees.
S. G. Bernard,
Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES

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No. 235

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Appellees.

MOTION.

To Richmond Mortgage & Loan Corporation, Appellant:

Now come the Wachovia Bank & Trust Company and Alexandra Garrett Johnston, Executors of the Estate of Robert P. Johnston, deceased, Appellees, and upon the grounds set forth in their accompanying statement opposing the jurisdiction of this Court and stating matters and grounds making against such jurisdiction, the said appellees move that this appeal be dismissed.

R. R. WILLIAMS,
Counsel for Appellees.
S. G. BERNARD,
Of Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 235

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Appellant,

vs.

WACHOVIA BANK & TRUST COMPANY AND ALEXANDER GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, Deceased.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

APPELLEES' BRIEF.

ROBERT R. WILLIAMS,
S. G. BERNARD,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

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No. 235

RICHMOND MORTGAGE AND LOAN CORPORATION,
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WACHOVIA BANK & TRUST COMPANY AND ALEXANDER GARRETT JOHNSTON, EXECUTORS OF THE ESTATE OF ROBERT P. JOHNSTON, Deceased,
Appellees.

BRIEF OF APPELLEES ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA.

Opinion Below.

The opinion of the Supreme Court of North Carolina in this case is printed in full on pages 38 to 41 of the Record; also in 210 North Carolina Reports, pages 29, 32.

Jurisdiction of the Court.

Consideration of jurisdiction was postponed to the hearing of the case on the merits. Appellees submit here a statement of matters making against the jurisdiction of this Court.

The judgment of the Supreme Court of North Carolina dealing particularly with the questions at issue, 210 North Carolina Reports, pages 33, 34 and 35 is as follows:

> "In the instant case, the validity of section 3 of the statute is challenged by the appellant on the ground that its enactment by the General Assembly of this State was in violation of section 10 of Article I of the Constitution of the United States, of the Fifth Amendment, and of section 1 of the Fourteenth Amendment of said Constitution, and was also in violation of sections 7, 17 and 35 of Article I of the Constitution of the State of North Carolina, in that said section impairs the obligation of the contract entered into by and between the plaintiff and the defendant prior to its enactment.
>
> "Section 3 of Chapter 275, Public Laws of North Carolina, 1933, is as follows: 'Sec. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee, or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as a matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale, or that the amount bid was substantially less than its true value, and upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent purchasers, nor shall it be held to affect or defeat the negotiability of any note, bond, or other

obligation secured by such mortgage, deed of trust, or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court, nor to any judgment sought or rendered in any foreclosure suit, nor to any sale heretofore made and confirmed.' "

"The statute recognizes the obligation of a debtor who has secured the payment of his debt by a mortgage or deed of trust to pay his debt in accordance with his contract, and does not impair such obligation. Nor does the statute hinder, delay, or defeat, in whole or in part, the right of the creditor to enforce such obligation by an action instituted by him against his debtor in a court of competent jurisdiction. There is nothing in the statute which prevents a recovery by the creditor in such action of a judgment for the amount due on the debt. The statute provides only that when the creditor has elected to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court. In such case, the amount bid by the creditor at the sale, and applied by him as a payment on the debt, is not conclusive as to the value of the property.

"We are of the opinion that the statute is valid, and so hold.

"The statute involved in this action is not 'emergency legislation,' nor is its purpose to provide a 'moratorium' for debtors during a temporary period of depression. For this reason, the cases cited by appellant from other jurisdictions are not applicable in the instant case. The statute recognizes the validity of powers of sale contained in mortgages or deeds of trust,

> but regulates the exercise of such powers by the application of well settled principles of equity. It does not impair the obligation of contracts, but provides for judicial supervision of sales made and conducted by creditors whose debts are secured by mortgages or deeds of trust, and thereby provides protection for debtors whose property has been sold and purchased by their creditors for a sum which was not a fair value of the property at the time of the sale. See Better Plan Building & Loan Asso. *v.* Holden (N. J.) 169 Atl., 289.
>
> "The statute is applicable in the instant case, and supports the judgment of the Superior Court. For that reason the judgment is Affirmed."

While it is true that appellant raised a federal question in the courts below, it was not necessary to decide the federal question in disposing of the case. In fact, the case was decided solely upon a state law, sufficient to support the judgment, and the Federal question was decided only incidentally as the rights of appellants were affected by the judgment.

Specifically the decision of the Supreme Court of North Carolina is made to rest upon this statement of the law:

> "The statute provides only that when the creditor has *elected* to become the purchaser of the property conveyed by the mortgage or deed of trust at a sale made under a power of sale contained in the mortgage or deed of trust, and thereafter, pursuant to such sale and purchase, acquires title to the property, he shall not recover judgment against his debtor for any deficiency, after the application of the amount of his bid as a payment on the debt, without first accounting to his debtor for the fair value of the property at the time and place of the sale, and that such value shall be determined by the court."

It appears, therefore, that the Supreme Court of North Carolina based its judgment upon the doctrine of election

of remedies, an independent ground, not involving a Federal question.

The doctrine of election of remedies obtains in North Carolina.

> "Where a person has presented to him an election of inconsistent remedies, he must, once for all, choose between them, and is bound by his choice so made."
>
> *Hanes* v. *Shapiro,* 168 N. C. 24, 84 S. E. 33.

> "An election once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election, or to the maintenance of a defense founded on such inconsistent right."
>
> *Baker* v. *Edwards & Son,* 176 N. C. 229, 97 S. E. 16, 18.

The State law upon which the Supreme Court of North Carolina bases its decision in the instant case is sufficient to support the judgment.

It is settled law that where the record discloses that the judgment of a State Court was based not alone upon a ground involving a Federal question but also upon another and independent ground broad enough to maintain the judgment, this Court will not take jurisdiction to review such judgment and will dismiss the writ of error brought for that purpose.

People of the State of New York ex rel. Thomas F. Doyle et al. v. *Atwell,* 261 U. S. 590, 592, 67 L. Ed. 814;

Cuyahoga River Power Co. v. *Northern Realty Co.,* 244 U. S. 300, 304, 61 L. Ed. 1153, 1157;

Adams v. *Russell,* 229 U. S. 353, 358, 57 L. Ed. 1224, 1226;

The 134 William Street Co., Inc., v. *Lynch et al.*, 293 U. S. 526;
Ohio ex rel. Eastman Co. v. *Stuart et al.*, 291 U. S. 643.

For the reasons set forth, we respectfully submit that the Supreme Court of the United States is without jurisdiction to hear this case upon appeal and, therefore, appellees' motion to dismiss this case should be allowed.

Appellant's Specifications of Error.

Appellant's Specification of Error #1 (page 8 of the brief) deals with what it terms an unconstitutional application of the statute. We will endeavor to show in our argument in opposition to this Specification of Error that the statute deals solely with a remedy, is a constitutional exercise of legislative power, and does not affect a substantial right of appellant.

Appellant's Specifications of Error Nos. 2, 3 and 4 (pages 8-9 of the brief) are so related that we will discuss them together, and endeavor to show that the judgment of the Supreme Court of North Carolina is fully sustained by the facts and the law of the case.

Summary of Argument.

I.

THE STATUTE IN QUESTION DEALS SOLELY WITH THE REMEDY OF APPELLANT IN ENFORCING ITS RIGHTS UNDER THE DEED OF TRUST, AND IS CONSTITUTIONAL.

Public Laws, N. C., 1933, pages 402 and 403;
Wilson v. *Standefer*, 184 U. S. 399, 416;
Bernheimer v. *Converse*, 206 U. S. 516, 530;
Tennessee v. *Sneed*, 96 U. S. 69, 74;
Oshkosh Water Works Co. v. *Oshkosh*, 187 U. S. 437, 439;

National Surety Co. v. *Architectural Co.*, 226 U. S. 276, 283;
Waggoner v. *Flack*, 188 U. S. 595, 602;
New Orleans, etc., R. Co. v. *Louisiana*, 157 U. S. 219, 224;
Crane v. *Hahlo*, 258 U. S. 142, 147;
Sturges v. *Crowninshield*, 4 Wheat. 122, 200.

II.

THE JUDGMENT OF THE SUPREME COURT OF NORTH CAROLINA AFFIRMING THE JUDGMENTS OF THE SUPERIOR COURT AND GENERAL COUNTY COURTS OF BUNCOMBE COUNTY, IS FULLY SUSTAINED BY THE FACTS AND THE LAW OF THE CASE.

Great Northern Railway Co. v. *Donaldson*, 246 U. S. 121, 124, 62 L. Ed. 616;
Campbell v. *City of Olney*, 262 U. S. 352, 354, 67 L. Ed. 1021;
U. S. v. *Yuen Pak Sune*, 183 Fed. 260, 266, 191 Fed. 825;
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Baker v. *Edwards & Son*, 176 N. C. 229, 234, 97 S. E. 16;
Adams v. *Spillyards*, 86 A. L. R. 1493, 61 S. W. (2d) 686;
Vanderbilt v. *Brunton Piano Co.*, 89 A. L. R. 1080, 169 Atl. 177.
Newark Savings Institution v. *Forman*, 33 N. J. E. 436;
Langever v. *Miller*, 96 A. L. R. 836; 76 S. W. (2d) 1025.

ARGUMENT.

I.

The statute in question deals solely with the remedy of appellant in enforcing its rights under the deed of trust, and is constitutional.

The statute complained of was enacted by the General Assembly of North Carolina at its legislative session in the year 1933, being Section 3 of Chapter 275 of the Public

Laws of North Carolina for the year 1933, at pages 402 and 403, and is in words and figures as follows:

> "SEC. 3. When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part; Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust, or other instrument; provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

While appellant contends that the application of the statute to it impairs substantial contractual rights, it admits that the statute operates only on the remedy (Brief, page 22).

The statute does not take from appellant all remedies which it enjoyed for the enforcement of its contract.

After the enactment of the statute, appellant had three courses of procedure open to it:

(1) Appellant could have instituted a suit against the appellees and recovered judgment for the amount due and at the same time asked for and obtained a decree of foreclosure of the deed of trust. Upon a sale of the property, the net amount of the sales prices would have been credited upon the judgment, and if the amount was insufficient to pay the judgment in full, appellant would have had a judgment for any deficiency.

(2) Appellant could have caused a sale of the property to be made by the Trustee under the power of sale contained in the deed of trust, stood by and permitted the property to be sold to someone else, and if the sales price was insufficient to pay the debt in full, appellant could have sued appellees and obtained a judgment for any deficiency.

(3) Appellant could adopt the course of procedure which it did, cause the property to be sold by the Trustee under the power of sale contained in the deed of trust, and itself bid at the sale and become the purchaser thereof. In this event, and only in this event, appellant was required under the above mentioned statute to account to appellees for the fair value of the property at the time of the sale. If it be found that the fair value of the property was then equal to the amount of the debt, appellant could not recover a deficiency, but if it be found that the fair value of the property at that time was less than the amount of the debt, appellant could have recovered judgment against the appellees for the difference between the fair value of the property and the amount of the debt.

Appellant was under no compulsion to bid at the sale and, therefore, voluntarily became the purchaser of the property mentioned in the deed of trust and subjected itself to the provisions of the statute. If the recovery of

a judgment for a deficiency had been an important consideration at the time of the sale, two courses whereby appellant might have obtained a judgment for a deficiency were open to it as above stated. We are strongly inclined to believe that appellant at the time of the sale preferred to take its chances of recovering payment of its debt by purchasing the property and thereafter selling the same at a better price. We are led to this conclusion by reason of the fact that the debt at that time amounted to $7,375.90 (R. 21) and after appellant became the owner of the property, it listed the same for sale with real estate brokers at the price of $12,500.00 (R. 18). A sale of the property by appellant at the above price, less the usual brokers' commissions, would have yielded the appellant the net amount of $11,875.00 in settlement of a debt of $7,375.90; and now, if such a sale could be effected and appellant recover of appellees in this action, appellant would have some $16,000 in settlement of its said claim plus interest.

The power of legislatures of the several states to pass laws affecting the remedy for the enforcement of contacts seems first to have been considered by this Court in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 122, 200, where Chief Justice Marshall stated the rule as follows:

> "The distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation exists in the nature of things, and without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation may direct."
>
> *Wilson* v. *Standefer*, 184 U. S. 399, 416;
> *Bernheimer* v. *Converse*, 206 U. S. 516, 530.

The rule of law laid down by Chief Justice Marshall has been followed by this Court to the present day.

> "The rule seems to be that in modes of proceeding and of forms to enforce the contract the legislature

has the control, and may enlarge, limit, or alter, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."

Tennessee v. *Sneed*, 96 U. S. 69, 74;
Oshkosh Water Works Co. v. *Oshkosh*, 187 U. S. 437, 439;
National Surety Co. v. *Architectural Decorating Co.*, 226 U. S. 276, 283.

By the express provisions of the statute the ancient right of foreclosure through the courts is preserved.

"Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

Public Laws N. C. 1933, pages 402, 403.

The right of foreclosure through the courts preserves to appellant the authority to obtain for itself every right and advantage which the contract and the law conferred upon it at the time the contract was entered into.

"It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away."

Waggoner v. *Flack*, 188 U. S. 595, 602.

"Modes of procedure in the courts of a State are so far within its control that a particular remedy existing at the time of the making of a contract may be

abrogated altogether without impairing the obligation of a contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away."

New Orleans, etc., R. Co. v. *Louisiana,* 157 U. S. 219, 224.

"No one has a vested right in any given mode of procedure and so long as a substantial and efficient remedy remains or is provided, due process of law is not denied by a legislative change."

Crane v. *Hahlo,* 258 U. S. 142, 147.

II.

The judgment of the Supreme Court of North Carolina affirming the judgments of the Superior and General County Courts of Buncombe County is fully sustained by the facts and the law of the case.

Appellant's Specifications of Error 2, 3 and 4 (Brief, pages 8-9, are so related that, with the permission of the Court, we will discuss these Specifications of Errors together.

The facts set forth in the record (pp. 10 to 20) amply support the verdict of the jury.

"The trial court held that there was sufficient evidence to sustain the verdict, and refused to disturb it. The Supreme Court of Washington affirmed the judgment. In this situation it is enough to say that it is not the province of this Court to weigh conflicting evidence. The record shows testimony supporting the verdict, and that is as far as this Court enters upon a consideration of that question."

Great Northern Railway Co. v. *Donaldson,* 246 U. S. 121, 124.

While the judgment had the effect of depriving appellant of a right which it had prior to the enactment of the statute

in question, under the facts it did not take away from appellant the right to a judgment for a deficiency under two courses of procedure which were open to it, under either of which appellant could have enforced every right which it claims in this action. The Supreme Court of North Carolina based its decision upon the well-established doctrine of election of remedies, an independent non-Federal question.

> "Unless a Federal right is involved, the State court's application of local laws will not be reviewed here."
> *Campbell* v. *City of Olney*, 262 U. S. 352, 354.

> "Broadly speaking, an election of remedies is the choice by a party to an action of one of two or more coexisting remedial rights where several such rights arise out of the same facts."
> *U. S.* v. *Yuen Pak Sune*, 183 Fed. 260, 266 (affirmed, 191 Fed. 825).

The doctrine of election of remedies obtains in North Carolina:

> "Where a person has presented to him an election of inconsistent remedies, he must, once for all, choose between them, and is bound by his choice so made."
> *Hanes* v. *Shapiro*, 168 N. C. 24, 27, 84 S. E. 33.

> "An election once made, with knowledge of the facts, between coexisting remedial rights which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election, or to the maintenance of a defense founded on such inconsistent right."
> *Baker* v. *Edwards & Son*, 176 N. C. 229, 234, 97 S. E. 16, 18.

Appellant complains that it should not be put to the expense, trouble and delays attending foreclosure suits in

order to establish its right to a judgment for a deficiency (Brief, page 25).

The answer to appellant's position in this respect is that in order to obtain a judgment for a deficiency, in any event, it had to prosecute a suit, or action at law, against the appellees, and it might as well have instituted a foreclosure suit in the first instance. Appellant's suggestion, that foreclosure suits are attended with delays, relates more particularly to suits in which the mortgagors have obtained injunctions because of some equitable right belonging to or claimed by the debtor. Our experience leads us to believe that no such delays as appellant complains of attend foreclosure suits by mortgagees, because the institution of such suits usually preclude injunctive relief in favor of mortgagors. Further, if appellant refrained from instituting a foreclosure suit because of anticipated obstacles to a speedy termination thereof, this would in itself constitute a reason for requiring such procedure, because it assumes that equities exist in favor of the mortgagor, the solution of which would require time. Moreover, if the prosecution of a foreclosure suit had been attended with all the delays and difficulties suggested by appellant and, therefore, objectionable on that ground, it could have allowed someone else to become the purchaser at the sale, and in the event of a deficiency, could have instituted an action therefor and the procedure for the collection of a deficiency would have been precisely the same as appellant followed in the instant case, with no more delays and at no greater cost.

We do not agree that the following cases cited in appellant's brief support its contentions, for that:

The statute construed by the Supreme Court of Arkansas in the case of *Adams* v. *Spillyards,* 86 A. L. R. 1493, 61 S. W. (2d) 686, provides, among other things, that:

> "SECTION 1. In any foreclosure, in any court in the State of Arkansas in which real estate is involved,

> the real estate securing the loan sought to be foreclosed, shall be considered to be the value of the loan made, irrespective of the amount which may be realized from the sale of such real property."

The statute under investigation by the Supreme Court of Arkansas, arbitrarily fixed the value of the security at the amount of the debt, without any regard to the real, fair, or market value thereof. We do not regard this case as being in point here.

The statute construed by the New Jersey Court of Errors and Appeals in the case of *Vanderbilt* v. *Brunton Piano Company,* 89 A. L. R. 1080, 169 Atl. 177, is not printed in the report of the case available to appellees, but we assume from a statement appearing in the opinion that the statute set up the fair market value of the security standing alone as a self-sufficient, resistless fact in reduction of an otherwise collectible debt.

That is not the case here in several respects. Under the North Carolina statute there are two courses of procedure whereby appellant could recover judgment for a deficiency, the difference between the amount of the debt and the amount for which the property might be sold, *i. e.*, a sale under the power of sale contained in the deed of trust to any person other than appellant, and a sale at foreclosure under decree to any one, including appellant.

While the New Jersey court, in the case of *Vanderbilt* v. *Brunton Piano Company, supra,* held the statute there in question unconstitutional, it quoted with apparent approval from the case of *Newark Savings Institution* v. *Forman,* 33 N. J. E. 436, as follows:

> "The act under consideration leaves the complainant a substantial remedy of the same kind as that taken away, according to the course of justice, as it existed when the contract was made, a remedy which is not only of the same sort, but is even more effica-

cious than that which is taken away. It has only taken away one of two remedies of a like character, one at law and the other in equity, and that is no contravention of the complainant's constitutional right."

Upon a careful examination of the opinion in the above case, we are persuaded to believe the New Jersey court would have sustained a statute similar to the one here in question.

The statute construed by the Supreme Court of Texas in the case of *Langever* v. *Miller*, 96 A. L. R. 836, 76 S. W. (2d) 1025, is not in point here, for the reason that appellant could have had a judgment for a deficiency in North Carolina since the passage of the statute if it had elected to prosecute a foreclosure suit. Moreover, the Texas statute seems to resemble the New Jersey statute more nearly than that of North Carolina. It would seem that the procedure followed in the Texas case is the only procedure available to mortgagees, whereas even now there are three methods of procedure available to beneficiaries under deeds of trust in North Carolina for the enforcement of their contracts.

III.

The judgment of the Supreme Court of North Carolina should be sustained.

Respectfully submitted,

ROBERT R. WILLIAMS,
Counsel for Appellees.
S. G. BERNARD,
Of Counsel for Appellees.

Service of the foregoing brief accepted and receipt of a copy thereof is hereby acknowledged, this the 3rd day of November, 1936.

KESH & WALTON,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 235.—October Term, 1936.

Richmond Mortgage and Loan Corporation, Appellant, *vs.* Wachovia Bank and Trust Company, et al., Executors. } Appeal from the Supreme Court of the State of North Carolina.

[February 1, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a judgment of the Supreme Court of North Carolina[1] sustaining the validity of a statute claimed to impair the obligation of a contract, contrary to Article I, Section 10, of the federal Constitution. The act provides that when the mortgagee, payee, or other holder of an obligation secured by real estate or personal property causes a sale of the property by a trustee, becomes the purchaser for a sum less than the amount of the debt and afterwards brings an action for the deficiency, the defendant may show, by way of defense and setoff, that the property sold was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus defeat the claim in whole or in part. The provision is copied in full in the margin.[2]

[1] 210 N. C. 29, 185 S. E. 482.

[2] Sec. 3 of Chap. 275, of the Laws of 1933:

"When any sale of real estate or personal property has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and off-set, but not by way of counter-claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or off-set any deficiency judgment against him, either in whole or in part; *Provided*, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument; *Provided, further*, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale heretofore made and confirmed."

In 1928 the appellees borrowed $8,000 from the appellant for which they executed negotiable promissory notes. As security they delivered a deed of trust pledging real estate. Upon default the appellant demanded that the trustee declare the indebtedness due, in accordance with the terms of the notes and deed of trust, and exercise the power of sale given by the deed. The trustee advertised the property, as required by the deed and the laws of the state, and made sale June 19, 1933; and one acting in appellant's interest purchased the land for $3,000. Upon expiration of a ten day period of redemption the property was conveyed to the purchaser. The appellant credited on the notes the sum realized by the sale which left $4,534.79, with interest, due and unpaid, and on June 18, 1934, brought action to recover this balance. The appellees pleaded the statute and alleged that the property, at the time and place of sale, was fairly worth the amount of the debt. In reply the appellant asserted that, as the notes and deed of trust had been executed prior to the passage of the law, the statute violated the contract clause of the federal Constitution. At the trial exception was taken to the court's refusal to enter judgment for the appellant on the pleadings. The court, over the appellant's objection and exception, submitted to the jury the question of the fair value of the property at the time and place of sale, and the jury found its value to be $8,000. An intermediate appellate court, and the Supreme Court of the State, affirmed judgment for the appellees.

Although admitting that the challenged legislation affects only a remedy for enforcement of the contract, the appellant urges that the alteration is so substantial as to impair the obligation of the contract. The applicable principle is not in dispute. The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right.[3] The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away.[4] The matter in dispute is whether the questioned

[3] *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56 and cases cited.

[4] *Home Bldg & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 434, and cases cited, note 13.

enactment falls beyond the boundary of permissible regulation of the remedy for enforcement of the appellant's contract.

The loan rendered the appellees debtors to the appellant. For that debt the borrower pledged real estate as security. The contract contemplated that the lender should make itself whole, if necessary, out of the security, but not that it should be enriched at the expense of the borrower or realize more than would repay the loan with interest. The state provided remedies whereby the security could be made available for solution of the debt.

When the loan was made two such remedies were available. The mortgagee could proceed by bill in equity to foreclose the security. If it did the chancellor who controlled the proceeding could set aside a sale if the price bid was inadequate. In addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness, but his decree in that behalf would be governed by well understood principles of equity. An alternative remedy sanctioned by state law was available if the deed of trust so provided. This was the sale of the pledged property by the trustee. If this were the remedy authorized by the contract, and the mortgagee himself became the purchaser at the trustee's sale, he might thereafter, in an action at law, recover the difference between the price he had bid and the amount of the indebtedness. The statute under attack effected certain alterations of this remedy. Sections 1 and 2, not here in issue, provide that if the mortgaged property be sold under power of sale, and the sum bid be inadequate so that consummation of the sale would be inequitable, the mortgagor may apply to the superior court for an order enjoining such consummation, and the judge may direct a resale by a trustee or by a commissioner appointed for the purpose, upon terms he may deem just and equitable. These sections modifying the procedure under a power of sale so as to assimilate it to the procedure in strict foreclosure, have been sustained as constitutional by the State Supreme Court.[5] The section with which we are concerned adds that if the mortgagee becomes the purchaser at the trustee's sale, and afterwards brings an action at law for a deficiency, the jury shall determine the actual amount needed by him to make him whole for his debt by finding the true or fair value of

[5] *Woltz* v. *Deposit Co.*, 206 N. C. 239, 173 S. E. 587; *Hopkins* v. *Swain*, 206 N. C. 439, 174 S. E. 409; *Miller* v. *Shore*, 206 N. C. 732, 175 S. E. 135; *Barringer* v. *Trust Co.*, 207 N. C. 505, 177 S. E. 795.

the property at the date of sale, the judgment being for the difference between that value and the amount of the debt remaining unpaid, or, if the value found equals the amount of the debt, for the defendant. The statute has no application if the purchaser at the trustee's sale be other than the mortgagee. The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its full enforcement but limits that right so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure a mortgagee was so limited because of the chancellor's control of the proceeding. That proceeding, as has been said, has always been available to the mortgagee in North Carolina. Granting that by the alternative remedy of trustee's sale the mortgagee might perchance obtain something more, or might obtain only that which was his due somewhat more expeditiously, than he could in chancery, it remains that the procedure to foreclose in equity is, and has been, the classical method of realization upon mortgage security and has always been understood to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee. If, therefore, the legislature of the State had elected altogether to abolish the remedy by trustee's sale we could not say that it had not left the mortgagee an adequate remedy for the enforcement of his contract. But the legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.